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LEADING CASES
OF THE
COURT OF CIVIL APPEALS
OF THE
STATE OF TENNESSEE

WITH
SYLLABI AND NOTES

By
JOSEPH C. HIGGINS
Associate Justice

VOL. VII.

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LEADING CASES

ARGUED AND DETERMINED

IN THE

COURT OF CIVIL APPEALS

OF THE

STATE OF TENNESSEE

STATE EX REL V. VON HUFFAKER.

.(Writ of ceritorari denied by Supreme Court.)

1. BILLS OF EXCEPTIONS. *Function of.*

The purpose of a bill of exception is to preserve and evidence for review a history of everything done during a trial not shown by the technical record.

2. SAME. *Whose duty to prepare.*

It is the duty of the appellant to prepare in the first instance what he conceives to be a proper bill of exceptions and to present it to the opposite side and then to the court. It is not the duty of the court himself to prepare in advance a bill of exceptions, nor to draft any part of it except where there is conflict or where he knows that the one presented is incorrect.

3. SAME. *Disputes with reference to contents. How settled, and view to be taken by appellate court.*

The trial court acts judicially in settling disputes as to the contents of a bill of exceptions; and when there arises the question as to whether the court or counsel was right as to

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these matters the appellate court will accept the sworn statement of the trial judge in the absence of demonstrative evidence arising upon the record to the contrary.

4. SAME. *Mandamus. Conclusiveness of answer.*

Appellate courts as a general rule accept as conclusive the sworn answer of the trial judge that a bill of exceptions presented to him was or was not a correct one. But the court must not be understood as holding that this rule of conclusiveness will be inexorably applied, the court refraining from ruling at this time as to what should be done where it is shown beyond a reasonable doubt that the circuit judge was in error.

5. SAME. *Mandamus. Practice with respect to compelling the signing of.*

The appellate court will never compel a lower court to sign a particular bill of exceptions which he avers to be inaccurate, nor will it compel him to state his refusal to sign a particular bill. But the court may, under certain circumstances, compel the judge to proceed to the consideration of the matter of a bill of exceptions with a view ultimately of the making up of a proper bill, leaving to him of course the determination of the contents.

6. SAME. *Stenographer's notes. To whom do they belong.*

The notes of a stenographer employed by a party during the trial for his own convenience and paid for by him are so far his private property as that the judge cannot compel him to deliver transcriptions thereof to the opposite party for the purpose of making up a bill of exceptions. Whether the court could compel the production thereof for his own convenience is a question reserved.

7. MANDAMUS. *When peremptory writ should be granted.*

When the answer of the defendant is meager or evasive or admits the case set forth in the petition the court should on motion order a peremptory writ to be issued. But an exception to this rule even in case of meagerness or evasiveness is that when the answer discloses one or two facts standing in the way of the right of the party, the peremptory writ should not issue.

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8. **SAME.** *Moving for peremptory writ upon answer.*

A motion for peremptory writ after answer filed is an admission of all well-pleaded facts.

9. **SAME.** *Judicial estoppel. Change of position.*

Where a petitioner in mandamus sought the aid of the appellate court to compel the circuit judge to sign a particular bill of exceptions and the trial judge met the petition upon this point, the petitioner was not allowed to insist in the appellate court that the judge be compelled by writ to sign the bill of exceptions presented by the appellee and admitted by the appellee court to be correct. This would not be fair to the circuit judge.

FROM KNOX COUNTY.

Petition for mandamus to compel Honorable Von A. Huffaker, Circuit Judge, to sign a bill of exceptions.

R. P. HUDSON and JOHN W. HUDSON for Petitioner.

L. D. SMITH and ROSCOE WORD for Defendant.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

THIS record presents an unfortunate controversy between an able and conscientious judge and an able and conscientious lawyer as to the form and contents of a bill of exceptions. It is a petition filed in the name of the State on the relation of one Chesney against Judge Huffaker for the purpose of having this Court order the judge to sign a bill of exceptions in a case tried by him in the Knox Circuit Court, wherein Chesney was plaintiff and Dr. Jones, a physician of Knoxville, was a defendant. The principal recitals of fact of the application

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are as follows: That the case named was heard before the Court and a jury, with the result that at the conclusion of the evidence the Court gave peremptory instructions against the plaintiff; that thereafter, in February, 1915, plaintiff made a motion for a new trial, which was overruled, and that he thereupon appealed to this Court and asked and was granted time in which to prepare a bill of exceptions; that his counsel went to work and within the time prepared what he deemed to be a correct bill and delivered it to opposite counsel for the purpose of assent or suggestions of error; that the latter was not prompt in this respect, in consequence of which the bill was taken to Judge Huffaker, with the request to sign or examine the same; that the latter refused to do so, either upon the ground that it had not been approved by the other side or that it was made up from memory, and that he was unable himself to pass upon its accuracy; that relator's attorney informed the Court that a professional stenographer had taken notes of the testimony for the other side, but refused to transcribe them for plaintiff unless the latter would pay for the same; that owing to the poverty of plaintiff this could not be done; that he made repeated efforts to have Judge Huffaker examine the bill of exceptions or to point out its incorrectness or to have the other side submit transcriptions of the evidence, all of which was refused; that many delays and extensions of time took place and were granted until the 27th of May, 1915, at which time, failing to obtain the signature of the judge to any bill of exceptions or have him compare the respective statements of the parties with respect to the history of the trial, the judge refusing to sign plaintiff's bill or to make one himself, or to enter upon an effort to adjust differences, petitioner, felt constrained to apply to this Court for writ

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of mandamus. The prayer was that Judge Huffaker make such corrections upon the bill of exceptions as were proper and sign the same or to sign a true bill of exceptions. After the answer of Judge Huffaker, to be subsequently noticed at length, was filed, relator presented an amended petition, in which he averred the presentation by counsel of the opposite side of the bill of exceptions which relator's attorney deemed to be wholly inaccurate in several particulars pointed out in his second petition. Petitioner reiterated his averment that the Court refused to sign a correct bill of exceptions or to make out any bill or to order the delivering up of the stenographer's notes for the use of the petitioner or to enter upon the work of adjusting differences.

The two answers of the defendant Huffaker were brief but pointed. Most of the historical recitals of the first petition were admitted, but the first material and impeaching allegation of fact was denied. The averment that respondent declined to accept petitioner's document as a bill of exceptions without making the slightest examination was emphatically denied. It was alleged, on the contrary, that the bill was examined in such a way as convinced respondent that it was not a proper nor accurate one and that its inaccuracies were so many and so great that it could not be amended so as to conform to the truth. Respondent also alleged that after ascertaining the insufficiency of the bill he urged relator's attorney to make an effort to agree with opposite counsel or to ascertain their differences and suggested that they bring the disputed matters before him with their respective contentions and that he would proceed to settle all the points from memory. Respondent asserted and reiterated his many efforts to get the attorneys together, and details a conversation in which he informed Mr. Hudson that he had no power

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to order opposing counsel to deliver to him a copy of the evidence, but that if the latter thought it should be done by respondent as a duty he would himself pay for the alleged copy. Respondent averred a willingness and readiness at all times to sign a proper bill of exceptions or to enter upon the consideration of all differences between the parties, and states that he extended the period of filing from time to time until he had reached the limit of thirty days from the adjourning day, but without success. Respondent in giving his version of the last day's effort averred that relator's attorney at that time emphatically demanded that respondent sign the bill of exceptions which relator had tendered or to refuse to sign the same, and that relator's attorney refused to enter upon the consideration of differences, notwithstanding the willingness and readiness of opposing counsel to submit to the Court the stenographic notes which had been taken; that relator's attorney refused to enter upon a comparison of his own bill of exceptions with that prepared by opposite counsel with the view of reconciliation, and declined to take any other step or make any other demand than that respondent sign his bill or require the other side to turn over to him for private or personal use the stenographic notes which had been paid for by his opponent. Respondent declined to do either, for the reasons above given; and thereupon this petition was filed.

We shall dispose of this controversy with some brevity. The common sense view should be taken, and this will be found to coincide with the juridical conception. It is to be regretted that these clashes come, but they will be repeated as long as men are fallible and zealous. Rules have been or must be devised to adjust these differences in a practicable way, always approximating justice but never requiring the impossible or unreasonable. Circuit

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judges have no more disagreeable duty than that of settling disputes with respect to bills of exception, and so long as they are acting in good faith and to the utmost, they should not be coerced.

Bills of exception are used for the purpose of getting into the record with proper verification the several steps in a trial which are not embraced in the rolls or minutes of the Court. This supplementing of the record is the work of the judge. He is the source from which the history of the case must be obtained, and hence his declaration of the presence or absence of a fact must generally be accepted as true. We are not prepared to say that his assertions cannot be disputed. But at the same time there must be no shadow of a doubt as to his fallacy before any statement of his can be treated as incorrect: *In re Cameron*, 126 Tenn., 660. This is peculiarly fitting, when it is remembered that he sits unbiased between two caloric foes who are adducing their respective strong points to be looked at with differing lenses. It is infinitely better to accept the Court's version than that of any antagonist unless there be a demonstration of error upon the part of the Court. We insert these qualifications of the proposition of infallibility of the Court with respect to matters, for the reason that we do not wish to go on record as holding that the litigant is absolutely bound by every statement of fact made by a judge in a bill of exceptions. We do assert that when there is a dispute and when there is no abuse of discretion and when the truth is a matter which is incapable of demonstration, the sworn statement of the trial judge must be accepted as controlling: *State v. Cooper*, 107 Tenn., 202.

After all the pleadings in this mandamus proceeding were filed in Court, learned counsel for petitioner moved that we at once award a peremptory writ against respond-

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ent upon the pleadings; and we are thus called upon to determine whether this request should be granted. It will be noted that we are not here asked to compel respondent to sign any particular bill of exceptions, nor to make one, nor to proceed with the matter of correcting those that have been submitted. But it is earnestly urged in a supporting brief that we compel the judge to do the one or the other. Petitioner insists that the answers filed by the defendant are evasive or unsatisfactory, and invokes the rule applied in such cases that a defendant to a mandamus proceeding may be required without more to comply with the demand of the alternative writ, upon the theory that the respondent has not shown contrary cause. Our first observation is that the answer of Judge Huffaker is not so meagre or evasive as to evince a dereliction upon his part or to confess that petitioner has any right which the Court has ignored. It is true that some minor averments are not responded to, and it may be that the answer is not commensurate with the length of the petition. At the same time, the essential allegations of the petition are met and admitted, explained or denied.

Alongside of the rule of evasiveness is another rule to the effect that when a mandamus proceeding is set for hearing upon the return of the respondent all well pleaded matters of fact of the answer are taken to be true. We have reached the conclusion that this form of practice, applicable here, will be sufficient to repel petitioner. It must be remembered that issues are not to be determined upon the averments of petitioners or declarations alone; and it must not be overlooked that there are cases in which one or two matters of fact or of law may be absolutely controlling. Another thing to be borne in mind is that the writ of mandamus is not to be issued except where the right thereto is clear and where an official has been in

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the wrong. If it be made to appear that a judge has in good faith exercised his discretion or has weighed differences in a judicial manner, he can never be coerced by the writ of a higher tribunal.

By recurring to our statement of the pleadings, it will be found that Judge Huffaker stated that upon the last day of their months of effort to arrive at a settlement of differences the attorney for relator demanded that he sign the bill which had been prepared by him or refuse to sign it, and that respondent declined to sign for the reason that the bill presented was not accurate. This is conclusive. Petitioner had no right to insist that the Court sign a particular bill, nor can this Court compel a judge to sign a particular bill which he avers is inaccurate where there is no conclusive evidence of its errors: *Vanvabry v. Staton*, 88 Tenn., 341; *State v. Maiden*, 110 Tenn., 487. It must be borne in mind that, accepting Judge Huffaker's version, petitioner's command was that he sign a certain bill known to the judge to be incorrect, not that he sign or suggest corrections or enter upon an effort to adjust differences. Hence, the powerlessness of this Court to interfere with this important judicial function. As to what should be inserted in a bill of exceptions the Court must determine *judicially*. And it is axiomatic that this cannot be controlled by mandamus. It is true that a judge cannot refuse without more to sign a particular bill. He should suggest amendment. But that was not the situation with which Judge Huffaker was confronted, and we are here to pass upon the legality of his action upon the final day. Judge Huffaker also states that at or just preceding the time when he was called upon to sign Mr. Hudson's bill he was given or there was suggested to him by Mr. Hudson the alternative of requiring opposing counsel to deliver to him, Mr. Hud-

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son, for his personal use, a copy of the evidence. This the Circuit Judge declined to do, and properly so. It was beyond his authority; the demand was illegal or improper, and hence it must be treated as no demand. We are therefore presented with the case of a demand upon the Court to sign a certain bill which he swears was incorrect and so incorrect as that it could not be made accurate. We repeat that the result of negotiations was a demand to sign a particular bill, and that the controlling question presented to us by the record in this Court is as to our power to compel this to be done. We, of course, must answer it in the negative.

Moreover, assuming, as we must, that Judge Huffaker's answer is true, we find that he repeatedly made efforts to adjust the differences, going to the extent of offering to compare the two bills presented and also expressing a willingness to examine petitioner's bill in the light of the stenographic notes which opposing counsel were willing for the Court to see. But to none of these requests would petitioner's counsel accede, his demand being that the stenographic notes be turned over to *him* for *his* use in making out a bill of exceptions.

There is no law which sanctions this practice. The notes certainly are so private as that opposing parties cannot make use of them without compensation. This is no discrimination against the poor; it is simply the application of the law of legal equality as it were. Nor must we intimate that a judge can refuse to sign a narrative bill of exceptions or a bill not made up from stenographer's notes. But he is never required to certify to a bill which he knows to be full of inaccuracies and omissions.

It is not the duty of the Court to make out a bill of exceptions. This is not required by our statutes, nor

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by our practice: Elliott's General Practice, 1063-1087. The preparation is ministerial.

A matter of some concern with us was whether we should mandamus Judge Huffaker to sign the bill which was prepared by opposing counsel, the judge admitting in his answer that it was substantially correct and expressing a willingness to sign it. But we have reached the conclusion that petitioner is not in position to insist that we do even this. It would be tantamount to an adjudication that the judge had been derelict in his duty and subject to compulsory orders of this Court, when, as a matter of fact, he is held by us to have been entirely blameless in his refusal to comply with the specific demands of petitioner. His conduct at that time only is under review. Having reached the conclusion that petitioner had no right to direct the course of the judge in the particulars pointed out, we feel it our duty to dismiss this petition without any command addressed to him. Besides, the petitioner seems estopped to insist now that the judge be compelled to sign a document so lacking in verity, according to petitioner's contention. The petition is dismissed and the writ of a peremptory nature disallowed. Petitioner will pay the costs of this proceeding.

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T. H. REYNOLDS v. W. M. LOWTHROP.

WRIT OF REPLEVIN NOT RUNNING IN NAME OF THE STATE.

A writ of replevin not running in the name of the State is absolutely void and incapable of amendment.

FROM LAWRENCE COUNTY.

Appeal in error from the Circuit Court of Lawrence County. W. B. TURNER, Judge.

J. D. BURCH for Plaintiff in Error.

L. B. WHITE for Defendant in Error.

SPECIAL JUSTICE SANSOM delivered the opinion of the Court.

THIS is an action of replevin brought by the defendant in error, Lowthrop, against the plaintiff in error, Reynolds, before a justice of the peace for Lawrence County to secure the possession of a cow and two calves, each party asserting title and ownership of the animals.

The replevin writ was in these words:

"To Any Lawful Officer of Said County:

"I command you to summons T. H. Reynolds to appear before H. L. Richardson, or any other justice of the peace of said county, to answer the complaint of W. M. Lowthrop for the unlawful taking into his possession and detaining from him one black Jersey cow, four years old, one fifteen-months-old calf, one three-months-old calf now

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sucking said cow, that property of W. M. Lowthrop, and I also command you to take said property out of the possession of said Reynolds and deliver same to said W. M. Lowthrop, he having given bond and security as required by law.

"This the 28th day of July, 1915.

"H. L. RICHARDSON, *Justice of the Peace.*"

The officer's return upon this writ shows that it was executed by replevying the animals described in the writ, and placing them in possession of the plaintiff, and is signed by John Skillern, Deputy Sheriff.

While the foregoing is a copy of the writ of replevin, it may be stated, as some stress is laid upon that point in argument of counsel, that the affidavit based upon which the replevin writ was issued is in these words:

"W. M. LOWTHROP v. T. H. REYNOLDS, *Replevin.*

"AFFIDAVIT.

"*State of Tennessee, Lawrence County.*

"Personally appeared before me, H. L. Richardson, acting justice of the peace for said county, W. M. Lothrop and made oath in due form of law, that according to his information and belief he is entitled to the possession, as owner of the same certain property, one black Jersey cow four years old, now giving milk, and one calf of said cow now sucking, three months old, and one fifteen months yearling calf, and the said T. H. Reynolds detains said property wrongfully and without authority. That the same is not subject to seizure and detention by the defendant. Wherefore he demands writ of replevin.

"W. M. LOWTHROP.

"Sworn to and subscribed before me, this the 28th day of July, 1915.

H. L. RICHARDSON, *J. P.*"

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On the hearing before the justice of the peace the replevin suit was dismissed and an appeal was prosecuted from this judgment to the Circuit Court, where the case was re-heard before the judge and jury, and there judgment was pronounced in favor of the plaintiff for the possession of the cow unless the defendant would pay to the plaintiff his bill of \$41.94, and there is controversy as to whether or not this payment was legally tendered, and if so, when and how, but we think we need not take up this matter in the view that the Court takes of the case.

There was motion for new trial by the defendant, which was overruled, and an appeal prosecuted to this Court. The motion in the lower Court for a new trial embraced a number of grounds, including the ground of no evidence to support the verdict, which is relied upon in this Court, among other errors assigned. There was likewise in the lower Court motion in arrest of judgment (the motion for a new trial having been overruled), upon the ground that the replevin warrant was void and a nullity, and constituted no basis for any judgment at all. The asserted invalidity of this warrant rested in the fact that it does not run in the name of the State. We have copied in a former part of this opinion the warrant in full, and have likewise copied the affidavit based upon which the warrant was issued.

The insistence of the defendant in error is, that the affidavit reciting the fact at its head, or having the heading "State of Tennessee, Lawrence County", supplies the defect in the replevin warrant itself in its omission to show the running thereof in the name of the State. It may be stated here instead of further on, that the affidavit is not "a process", while the writ of replevin is a "writ" of "process".

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The Constitution of Tennessee, Article 6, Section 12, is in these words:

“All writs and other process shall run in the name of the State of Tennessee and bear test and be signed by the respective clerks. Indictments shall conclude ‘against the peace and dignity of the State.’ ”

Shannon’s Codification of Laws of Tennessee, Section 5150, based upon the acts of the Legislature of 1851-2, Chapter 32, Section 8, says that the form of a replevin writ before a justice of the peace shall be as follows:

“STATE OF TENNESSEE,

“_____ County.

“*To the Sheriff or any Constable of Said County:*

“I command you to summon _____ to appear before me, or some other justice of said county, to answer the complaint of _____, for unlawfully taking out of his possession and detaining from him (describe the property), the property of the said _____. And I also command you to take said property out of the possession of the said _____ and deliver the same to the said _____, he having given bond and security as required by law.

“This _____ day of _____, 18—. E. F., J. P.”

It is perfectly manifest that the form used in the case at bar does not comply with either the constitutional requirement or the statutory provision. The Circuit Judge overruled the motion in arrest of judgment based upon this ground, and the question before this Court is whether or not his holding in that regard was right or wrong.

The case of *McLendon v. State*, reported in 8th Pickle, was where an arrest had been made by the sheriff of Shelby County under a process directed to him and issued from

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the Criminal Court of that county at its September term, 1890. This process was issued to him for the arrest of the alleged offender, but it did not run in the name of the State of Tennessee and the sheriff, having executed the process arrested the party named in the process, and was sued for damages for false imprisonment, the ground thereof being that the process itself was void, not having run in the name of the State as was required by the Constitution and the laws of the State. The Court held that the sheriff and his bondsman were liable for illegally arresting the party under the void process. The Court says that the order in question was a writ or process, and that it could not be valid unless it ran in the name of the State of Tennessee, and as it had not so run, it was void upon its face. The Court refers to the case of the *Mayor and Aldermen v. Pearl*, 11 Humphreys, 251, a case in which a distress warrant for the collection of taxes was issued and was held to be void because running in the name of the "corporation of Nashville" instead of in the name of the State of Tennessee as required by the Constitution.

It is held that justice writ of attachment that does not run in the name of the State is void, and that the writ of attachment issued by a justice of the peace, which is void upon its face for the failure to run in the name of the State, cannot be amended in the Circuit Court after appeal so as to remedy this defect, it being absolutely void. *Hooper v. Turner*, 17 Pickle, 686.

Where a warrant states no cause of action, or is defective otherwise to the extent of any violation of, or failure to, comply with statutory and constitutional essentials, it is void, and being void it is not the subject matter of amendment. A voidable process may be amended, but a void process cannot, and it is further held that mere imperfections and incorrectness of statement, where notwithstand-

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ing such as they may be, the process gives the notice required by law, are cured by the verdict, but that a verdict is not cured where *no process* is issued, or if issued the process *states no cause of action*, in either of those cases there is in law no warrant and verdict based upon the void warrant is in law *no verdict*. The whole proceeding is void and the law so treats the proceeding from beginning to end. *Railroad v. Davis*, 19 Cates (127 Tenn.), 172.

The motion in arrest of judgment in this case should have been sustained by the Court because the writ of replevin is absolutely void. It does not run in the name of the State of Tennessee as required by the Constitution and statutory provisions. And being void absolutely, for want of conformity and compliance with essential requirements of the Constitution and statutory law, the writ constitutes no basis for any judgment or action at the hands of the Court, and was not even the subject matter of amendment, being absolutely void upon its face.

The assignment of error to the Court's action in failing and refusing to sustain the motion in arrest of judgment is sustained. The judgment is arrested and suit dismissed for the reason stated, at the cost of the defendant in error.

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W. F. PARKER v. CHATTANOOGA POWER COMPANY.

(Affirmed by the Supreme Court, 1916.)

1. EMINENT DOMAIN. *Limitation of action of landowner.*

The right which the owner of land taken under eminent domain has to recover its value and incidental damages is barred within one year after the actual taking, whether the landowner proceeds by petition or by ordinary action.

2. SAME. *Exception as to recurrent damages.*

The court expressed the opinion that this rule would not apply to damages suffered at intervals and from extraordinary floods occasioned by the erection of a dam where the overflowed land was not taken and where the condemnor asserted no right to the overflowed land at all.

3. PRACTICE. *Estoppel to assert different action than that tried in the lower court.*

A party who proceeded in the lower court upon the theory that his land had been condemned could not change his position in the appellate court so as to insist that he was suing in trespass.

FROM HAMILTON COUNTY.

Appeal in error from the Circuit Court of Hamilton County. NATHAN BACHMAN, Judge.

TATUM, LYNCH & THATCH and MURRAY & DRAPER for Plaintiff in error.

SPEARS & SPEARS and WILLIAMS & LANCASTER for Defendant in Error.

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MR. JUSTICE HIGGINS delivered the opinion of the Court.

THE exact nature of this suit will be determined by us later. We shall now speak of it as an action by Parker to recover the value of or damage to some fifty-two acres of land owned by him and lying on either side of Look-out Creek in Hamilton County. The complaint in his declaration was that the defendant in error had taken possession of this land or had asserted the right to overflow it by reason of the construction of a dam in the Tennessee River above Chattanooga.

The company by original and amended pleas defended upon the ground that it erected its dam pursuant to statutes vesting it with eminent domain power, and that the taking preceded the suit more than twelve months, and that plaintiff's action was barred. The cause went to trial upon the issues thus raised. The Circuit Judge was of opinion that plaintiff's right of action was under the eminent domain statute, and that it was barred by the limitation of twelve months. He consequently sustained the motion of the company for a directed verdict and dismissed the suit. From this action and judgment Parker has appealed and assigned numerous errors.

We have given this controversy more than usual consideration. We have reached the conclusion, after mature deliberation, that plaintiff was proceeding under the eminent domain theory, and that the cause was tried as such in the lower Court, and that is too late to give it any other character. In consequence we must treat it as an action by a landowner to recover of a condemnor the value of lands taken and incidental damages. The primary question raised is as to whether an owner who sues a condemnor who takes possession without petition is barred by the

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twelve months section of our eminent domain chapter, Shannon's Code, 1866, or whether he may bring his action of trespass or for use and occupation, in which case the limitations are three and six years.

We had no uniform system upon the subject prior to the Code of 1858. One of the sections of the chapter of that Code devoted to the subject, which section subsequently became No. 1866 of Shannon's Code, is in substance that if the condemning party has actually taken possession of the land, occupying it for the purposes of internal improvement, the owner of such land may petition for a jury of inquest, in which case the same proceedings may be had as hereinbefore provided; or he may sue for damages in the ordinary way, in which case the jury shall lay off the land by metes and bounds and assess the damages as upon the trial of an appeal from the return of a jury of inquest. The succeeding section of the Code is as follows: "The owners of land shall in such cases commence proceedings within twelve months after the land has been actually taken possession of and the work of the internal improvement begun."

It is ingeniously argued by able counsel for appellant that by virtue of the prior section the owner may sue in an ordinary way, and that this implies all the remedies and limitations attaching to ordinary actions. The contention of the defendant in error is that the section later quoted puts a limitation of twelve months upon any action brought to recover the value of land taken under the eminent domain power. While there is room for doubt and controversy, we have reached the conclusion that the position taken by the defendant in error is the correct interpretation. There may have at some time been variation of view; but after much consideration we are persuaded that the legislative intention was to bar all actions by owners

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against those who have appropriated land by virtue of charter or legislative authority.

We took the pains to consult the statutes from which this section was derived and compiled, and found that they clearly required the instituting of actions within twelve months. These limitations were found in turnpike charters. See section 9, chapter 72, Acts 1849-50, wherein it was provided that no suit for damages on account of the construction of a road over the lands of a person shall be brought after twelve months from the filing of the location and surveying of the route; and see chapter 132, Acts of 1855, section 10 and section 11, wherein the above provision was modified so as to allow the bringing of suit at any time within twelve months after the road had been built over the lands of another. There is no room for mistake as to the meaning of these older Acts; and when they are borne in mind in the reading of Shannon's Code, 1867, we are persuaded that the twelve months limitation must be accepted. This was assumed without controversy to have been the law in *Railway v. Jennings*, 130 Tenn., 450.

The serious question then is when there was a taking in the sense of the statute such as justified or required the bringing of suit. Parker sought the value of his land and incidental damages resulting from the overflowing of his premises occasioned by the construction of a dam in the Tennessee River at Hale's Bar, several miles above Chattanooga. That the appropriator had eminent domain power is beyond dispute. It was conclusively shown that the dam was completed on the 31st day of October, 1913, and that the water began to accumulate, back and to rise immediately. Parker was the owner of lands on Lookout Creek, a tributary of the Tennessee. Immediately after the completion of the dam the water level of the creek

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adjacent to his premises was raised some five feet above ordinary low water mark. It was also shown that some of this water flowed back upon and interfered with or destroyed a constructed ford in the creek used by Parker in passing from one portion of his farm to the other. It is manifest that at this time, that is, early in the month of November, he suffered some damage, and there was an appropriation of some of his property. Lookout Creek being non-navigable, he was the owner of its bed and its banks, and had the right to maintenance of its ordinary water level. Hence the invasion of this right and appropriation of his land early in November by the raising of the water level and augmentation of the quantity, and permanent destruction or rendering useless of his ford.

We are constrained to the view that he then had a right of action under the eminent domain laws, and that it had accrued one year before the 20th of November, 1913, the day upon which the present suit was instituted.

In the trial of this case he sought to show the quantity of land which had been overflowed or affected permanently by the backwater, and also the area which would be recurrently but yet constantly overflowed at a ten-foot rise in the stream, and the area that would be covered by a fifteen-foot rise. He submitted maps showing these different parcels, and sought throughout to recover the value of the land upon the theory that it had been taken by the defendant; and so far as we can ascertain there was no attempt to prove damages to the remainder of his tract, nor the damages sustained by recurrent floods, and no attempt to distinguish between temporary and permanent damages.

We feel constrained to coincide with the learned trial judge that the action as thus waged was barred by the statute of limitations. We apprehend that a different dis-

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position would have been taken of this case had it been a straight suit to recover damages occasioned by the intermittent floods; and yet we are not to be understood as deciding this question absolutely in favor of the plaintiff. We are nevertheless of the opinion that with respect to some injuries which Parker has and will sustain there may be brought a common law action in which there can be some recovery, with the limitation that he cannot demand compensation for any lands taken and damages necessarily inflicted and calculable more than twelve months before the institution of this suit. In other words, we are of opinion that Parker is precluded from bringing any suit to recover at any time the value of any lands which were manifestly appropriated by the company by the backing of water thereon and the unmistakable infliction of damages such as could have been or could be now estimated as having been sustained within a very few days after the completion of the dam. We apprehend that with respect to the lands thus covered or the lands thus damaged from the start there was a taking for which suit would have to be brought within twelve months.

But with respect to damages that this man may or may not suffer by reason of high floods we are inclined to the view that he should have his ordinary action, and this upon the theory that the power company has not undertaken to assert appropriation of the lands which may at intervals be thus affected, and that in the nature of things it is not an appropriator or taker in such sense as to put the landowner to his action for damages under the eminent domain laws. It must be remembered that actions under these statutes are exclusive; *Railroad v. Transportation Co.*, 128 Tenn., 277; and if so, then the owner should be held limited to such damages as in the nature of things can be computed once for all. Again, our eminent domain stat-

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utes contemplate a laying off of the lands by metes and bounds and the vesting of title in the condemnor and the exclusion of the owner therefrom: *Power Co. v. Lay*, 133 Tenn., 511. If it be impossible thus to define the quantum of land taken, or if the condemnor asserts no right of possession, but leaves the owner to the use of the property wholly with the exception of an interference occasionally brought about by the public improvement, we think the owner should have his right of action for damages for such inconveniences as he thus sustains, and that a denial of this right would be in plain violation of the Constitution. For there may be an infraction of the constitutional provision against taking property without compensation where there is no appropriation in the sense of our condemning statutes. And in such case we are of the opinion that the one year statute has no application.

In the instant case the power company does not want nor claim Parker's land, nor is it asserting the right to overflow it by extraordinary flood. Moreover, it might be that Parker would go for years without inconvenience occasioned by the dam exclusively. This might be brought about by change in rainfall and elevation of his own lands or by change in uses. Hence, a demonstration of the true propositions that the line between himself and the power company can never be defined, and hence the impossibility of appropriation in the sense of the condemning statutes; and also demonstration of the impossibility of any Court or jury at any one time determining how much damages Parker had sustained by the internal improvement. The following cases have direct bearing: *Los Angeles v. Pomeroy*, 134 Cal., 597; *Railroad v. Marchant*, 119 Pa. St., 541; *Ridley v. Railroad*, 32 L. R. A., 708.

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But we leave for fuller consideration this subject in case a different kind of action is instituted. It is going to be difficult to distinguish between elements of damages which could have been recovered within twelve months and those which may be considered as occasioned intermittently and not strictly because of the exercise of the power of eminent domain. But we feel the injustice of any rule or interpretation which will deny a landowner compensation for inconveniences or impairments of use which he suffers at intervals, even by companies having the right to condemn and appropriate. No man should be denied his right to sue at stated periods for damages which he could not in the nature of things foresee.

But we feel constrained to hold that an action brought under the eminent domain statute for any damages manifestly sustained by the internal improvement is barred after twelve months from the taking; and with respect to overflowing of lands the taking must certainly date from the time the water is backed permanently upon the owner's premises. With the limitations and suggestions above given we direct an affirmance of the judgment of the Court holding that plaintiff in error could not sue. Parker is taxed with the costs.

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H. B. CHAMBERLAIN AND W. K. McALISTER, RECEIVERS,
v. L. S. VAUGHN, ADMINISTRATOR.

Writ of certiorari denied by the Supreme Court, 1916.

1. RAILROADS. *Statutory precautions. Train with two engines.
Road not liable for collision when.*

A railway company is not necessarily liable under the statutory precautions for a collision occurring with a train which is operated at the time with two engines, one in the front and one in the rear. And yet if by reason of having two engines the company disables itself from complying with the injunctions of the statutes it may be liable. But if it be shown that the company at the time of the collision was in the observance of and complied with the statutory precautions and that the fact of having an engine on the rear had nothing to do with the collision, there can be no recovery.

2. SAME. *Statutory precautions. Obstruction upon the track.
Question for the jury.*

When the evidence shows circumstances from which a jury might infer that the injured one ought to have been seen by the engineer or fireman before the time of collision, the questions of non-observance of the statute should be submitted to the jury.

3. DEATH BY WRONGFUL ACT. *Mental and physical suffering.
Lack of evidence as to. Erroneous instruction.*

Where the evidence conclusively shows that the deceased was almost instantly killed, the court was in error in telling the jury that they might consider mental and physical suffering as elements of recovery of damages.

FROM PUTNAM COUNTY.

Appealed in error from the Circuit Court of Putnam County. C. E. SNODGRASS, Judge.

Chamberlain and McAlister, Receivers, v. Vaughn.

ALGOOD & FINLEY for Plaintiff in Error.

O. K. HOLLADAY and E. F. CLOUSE for Defendant in Error.

MR. JUSTICE HALL delivered the opinion of the Court.

THIS is an appeal in error by the plaintiffs in error, who are receivers of the Tennessee Central Railroad Company, from a judgment rendered against them in the Court below upon the verdict of the jury in favor of the defendant in error for the alleged negligent killing of his intestate, Carl Vaughn.

The verdict of the jury was originally \$7,500.00, but upon the hearing of the plaintiffs in error's motion for a new trial, a remittitur was ordered by the trial judge for the amount of \$5,500.00, which was accepted by the plaintiff below under protest, after which judgment was entered against the plaintiffs in error for the sum of \$2,000.00. The administrator has also appealed from so much of the judgment of the Court as ordered the remittitur above mentioned, and has assigned error, challenging the action of the Court in ordering said remittitur.

The plaintiff's declaration contains three counts. The first count, after averring the capacity of plaintiffs in error, and stating that they were operating and controlling the Tennessee Central Railroad, and had in their employ divers servants and agents engaged in operating trains over and along said road, further avers that plaintiffs in error, on November 27, 1913, wrongfully and negligently ran one of their engines and cars upon, over and against the intestate of defendant in error while upon the tracks of plaintiffs in error near the town of Monterey, in Putnam County, Tennessee, whereby his intestate was killed.

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The second count contains substantially the same averments as the first with the additional averment that though defendant in error's intestate appeared on the track of said railroad in front of one of their moving trains, and in plain view of any person who might have been upon the engine on the lookout ahead, and could have been seen by such lookout, if he had been in the performance of his duty, in time to have prevented a collision with his said intestate; but that plaintiffs in error wrongfully and negligently ran said engine and cars upon, over and against his intestate without sounding the alarm whistle, putting down the brakes, and using all possible means to stop said engine and cars and prevent the accident, as required by statute.

The third and last count avers that plaintiffs in error made up at Monterey, which was a freight division of said railroad, a freight train, which they negligently so arranged that it had an engine in front and a number of box cars next to said front engine, and behind these cars another engine, both of which engines were used in running and operating said train, and were attached to and a part of said train, the front engine pulling and the rear engine pushing said train, which arrangement of said train was gross negligence on the part of the plaintiffs in error, on account of which the engineer operating the front engine was unable to stop said train without the assistance of the engineer on the rear engine; and by reason of the negligent construction of said train and the negligent way in which said train was being operated, the plaintiffs in error could not and did not use the necessary precautions to prevent the killing of plaintiff's intestate, who appeared upon the track in front of said train, and did recklessly and negligently run over plaintiff's intestate, killing him.

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The Railroad Company filed a plea of the general issue to said declaration.

It is insisted by the receivers in their first assignment of error that there is no evidence to support the judgment. And by their ninth assignment of error it is insisted that the trial Court should have sustained their motion for a directed verdict made at the conclusion of all the evidence in the case.

This last contention is based: (1) Upon the insistence that the undisputed evidence shows that the plaintiffs in error, or their agents and employes engaged in the operation of said train, complied with the statutory precautions prescribed by our statute for the prevention of accidents on railroads as soon as defendant in error's intestate was and could, by the exercise of due care, have been discovered as an obstruction upon the track; and (2) that there is no evidence tending to show that defendant in error's intestate was alive at the time he was struck by the locomotive of plaintiffs in error.

We are of the opinion that neither of said assignments are well taken. We think there is material evidence in the record tending to show that the servants of plaintiffs in error did not comply with the statutory precautions as soon as defendant in error's intestate became visible as an obstruction upon the track, and also that he was alive at the time he was collided with by the train.

Evidence was offered by the plaintiff below showing that his intestate, with several companions, went to the home of a Mrs. Owen (a woman of bad reputation for chastity), situated near the main track of the Tennessee Central Railroad about two and one-half miles east of Monterey, on the night of November 27, 1913, to attend what is called in the record a "box party." The evidence shows that the deceased and his companions pro-

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ceeded on foot along the track of the railroad controlled by plaintiffs in error all the way from Monterey to the Owen home. The evidence tends to show that there were a number of guests at this "box party," both male and female, and that several of the male guests, including defendant in error's intestate, were under the influence of liquor. It appears that between the hours of ten and eleven o'clock on the night in question defendant in error's intestate became involved in a difficulty with Mrs. Owen's daughter, when the young lady's brother intervened and threatened to shoot him, but was prevented from doing so by another young man who was present, and said difficulty seems to have terminated without any violence having been inflicted by any of the participants, except Miss Owen kicked defendant in error's intestate on the face. Defendant in error's intestate left the Owen home immediately after this difficulty, and was not seen any more until he was discovered upon the railroad track about a mile west of the Owen home the next morning between three and three-thirty o'clock, immediately before the accident.

He was struck by the engine of a freight train which had been made up at Monterey, and was being moved east over the track of the plaintiffs in error. This train consisted of some twenty or twenty-two cars and two engines. One of these engines was attached to the front of said cars, which were coupled together, and was engaged in pulling them, while the other engine was attached to the rear of said cars and was pushing them. The engine attached to the rear of said cars was not connected with the remainder of the train by any air brake connection, but was simply coupled to the rear of said train by means of the ordinary coupling apparatus.

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Defendant in error's intestate was first discovered on the track by the engineer on the front engine, who testified that when he first discovered the deceased his engine was within three or four car lengths of him, and he says that he immediately sounded the alarm whistle, applied his air brakes in emergency, and did all that he could to stop the train and prevent the accident, but that the train could not be stopped in time to prevent a collision with the deceased, whom the proof shows was run over and his body dragged along the track for a distance of more than 200 feet. The evidence shows that the average length of a car is from thirty-six to forty feet, which, according to the testimony of the engineer, put his engine within less than 200 feet of the deceased at the time he was discovered upon the track. The evidence shows that the track was straight for a distance of 1,200 feet west of the point of the collision, and there was no obstruction to interfere with the view of any person upon the engine who might be on the lookout ahead along the track for obstructions. The evidence tends to show that the front engine was equipped with a good electric headlight, which was burning at the time of the accident, and that headlights of this character throw sufficient light along the track to enable a person upon the lookout ahead to see an obstruction upon the track for a distance of one-fourth of a mile in front of the engine. The evidence is in conflict as to the character of night this was. Some of the witnesses testified that it was a clear night, while others testified that the night was dark and cloudy, and that there was much smoke in the locality of the accident.

The engineer says that when he first observed the deceased he was lying upon the track between the rails, and did not move before being struck. He further testified that his attention was first called to a dark looking ob-

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ject upon the track, and that he immediately shut off his steam, and after running a car length or two he discovered that said object was a man, whereupon he immediately sounded the alarm whistle, applied his air brake in emergency, and endeavored to stop his train and prevent the accident.

The evidence shows that the deceased was horribly mangled by the collision, and one of his legs was cut off just above the ankle, and that his foot was found at or near the place where his body was picked up, which was on a trestle something like 250 feet east of the point of the collision. The evidence shows that from the wound where the leg was severed blood had flowed, or "spurted," as some of the witnesses put it, in a considerable quantity. There was blood upon the ties where deceased's body lay, and the blood had run down between the ties on the ground beneath the trestle.

According to the physician who examined this blood it was arterial blood, and would not have flown from said wound if the deceased had been dead at the time the wound was inflicted. Arterial blood is described by the physician as red blood, while venous blood is dark. The evidence shows that arterial blood will not flow from the arteries after life is extinct—especially in any considerable quantity; and we think, in view of the fact that a large quantity of arterial blood was found at the place where the deceased's body lay, there is some evidence tending to show that he was alive at the time he was stricken by said engine. Furthermore, some of the witnesses testified that there was still warmth in his body when examined by them an hour or two after the accident.

In view of the evidence, we are of the opinion that the Court was warranted in submitting the case to the jury both upon the question of whether the plaintiffs in error,

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or their servants, saw the deceased upon the track as soon as he could have been seen, and used all means available to stop the train and prevent the accident after deceased was discovered upon the track, and whether he was alive at the time of the collision. We do not think the Court would have been warranted in determining as a matter of law either of these questions in accordance with the contention of plaintiffs in error.

By the second assignment of error of the defendants below, which is erroneously numbered as the third, it is insisted that the Court erred in refusing to give in charge to the jury a certain special request seasonably offered by them as follows:

“Defendants request the Court to charge the jury that if they find from the evidence that defendants had a look-out on the front engine as required by law and compiled with all the statutory requirements for the prevention of accidents on railroads, and that said accident would have happened if said rear engine had been attached to the train at any place in same or in any way, then the jury should return a verdict for defendants, although they might believe that if said rear engine had been at some other place in the train or differently attached, the train could have been stopped in a shorter distance.”

We think this request was sound, applicable to the facts of the case; was not covered by the general charge, and should have been given. There was some evidence tending to show that if said rear engine had been attached to said train of cars immediately in the rear of the front engine, or had been connected with the train of cars, situated as it was, by air brakes, it could have been stopped in a shorter distance than it was after deceased was discovered upon the track. According to the testimony of one of the witnesses it could have been stopped some fifty or

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sixty feet short of where it was actually stopped. However, the evidence tends to show that if the engine and train had been stopped at this shorter distance it would not have prevented the accident, because the evidence shows that the engine and train ran some 240 or 250 feet after it struck the deceased.

It results, therefore, that there was evidence tending to show that if the engine had been placed in the front portion of the train instead of the rear portion, and had been properly connected with air brakes, the accident would have happened nevertheless; and the fact that one of the engines was attached to the rear end of the train rather than the front, and was not connected with the train by air brakes, was not one of the direct and proximate causes of the accident; and if this were true, there could be no liability upon the part of the railroad company growing out of the location and equipment of said rear engine. We think this request was vital, in view of the instruction given by the Court in his general charge to the jury, which is complained of by plaintiffs in error in their tenth assignment. Said instruction is as follows:

“However, it is insisted that the engine was not connected with the braking facilities of the front engine as it might have been but disconnected with the air brakes, and that had it been so connected with the brakes without danger to the lives of those on the train, might have been applied to the rear engine and thus the train might have been brought to a standstill earlier than it could have been with the rear engine pushing and disconnected with the brakes. If this is true, gentlemen, or unless it shall otherwise appear by a preponderance of the proof, then a liability would be established and you should find for the plaintiff, as a train thus operated would not be in compliance with the statute. But if connecting the rear

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engine with the braking facilities of the front engine would have served no utility in the stopping of the train or if such a connection would have endangered the lives of those upon the train or have interfered with the safe and efficient service of such engine, then no obligation would exist requiring its connection, nor could liability be predicated because of its disconnection.”

By this instruction the jury were told that if the engine and train could have been stopped earlier by the rear engine being connected with the remainder of the train by proper braking facilities, plaintiffs in error would be liable, regardless of whether this earlier stopping of the train would have prevented the collision. If the Court had told the jury that if by properly connecting the rear engine with the remainder of the train it could have been brought to a stop earlier and the accident averted, the instruction would have been entirely sound. As before stated, the evidence tends to show that if the train had been stopped at a distance of fifty or sixty feet west of where it was stopped, which the evidence tends to show could have been done if the rear engine had been properly connected, or had been properly placed in the train, this would not have prevented the accident. Of course, if the failure to properly place and connect the rear engine in and to the remainder of the train in no way contributed to the accident, plaintiffs in error could not be held liable on account of the improper location and connection of said rear engine.

It is insisted, however, by counsel for defendant in error that when the instruction is considered as a whole, and especially as the latter portion of the instruction, it is free from error. We do not think the latter portion of the instruction, when considered in connection with the first portion, cures the vice in said instruction, which

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is that if the train could have been stopped earlier by the rear engine being connected by proper braking facilities, plaintiffs in error would be liable. It is true the latter part of the instruction told the jury that if connecting the rear engine with the remainder of the train by proper braking facilities would not have aided at all in stopping the train; or if such a connection would have endangered the lives of those upon the train; or would have interfered with the safe and efficient service of such engine, then no obligation would exist requiring such a connection of said engine, and no liability could be predicated on account of its disconnection. This is, in substance, the meaning of the latter portion of said instruction.

By the thirteenth and last assignment of error it is insisted that the Court erred in submitting to the jury the mental and physical suffering of the deceased as elements of damage in his instructions to the jury upon the question of damages, because the evidence fails to disclose that the deceased suffered any physical or mental pain on account of his injuries.

We think, in view of the evidence, that these elements of damage should not have been charged upon or submitted to the jury by the Court. There is absolutely no evidence in the record tending to show that the deceased suffered either physically or mentally after he was struck by the engine, from the injuries inflicted upon him. There is no evidence whatever that he was conscious even for a moment after the collision. Upon the other hand, the nature and character of the wounds and bruises upon his body would indicate that he was killed instantly, or so near instantly that he was unconscious and did not suffer either physically or mentally.

We have examined the remaining assignments of error, except the one bearing upon the question of the exces-

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siveness of the verdict, which, in view of the fact that the case must be reversed and remanded for the errors indicated, it is unnecessary for us to pass on, and we find that none of said assignments are well taken, and are, therefore, overruled.

For the errors indicated in this opinion, however, the judgment of the Court below is reversed, and the cause is remanded for a new trial.

The defendant in error, as administrator of the deceased, will be taxed with the costs of this appeal.

Judge Higgins dissents. He is of the opinion that the errors committed by the trial judge, and which are indicated in this opinion, were harmless. He is of the opinion that a further remittitur of \$1,000.00 should be ordered, and if accepted by the defendant in error, the judgment as remitted should be affirmed.

Devoto v. State.

A. F. DEVOTO V. STATE EX REL.

Writ denied by the Supreme Court, 1917.

1. **CONTEMPT. Injunction. Recital by decree of issuance.**

A recital in a decree that a permanent injunction had been ordered issued and served upon a defendant is conclusive until set aside. In such case it is unnecessary in a contempt proceeding to make other proof of such steps.

2. **SAME. Judicial notice of entries and writs.**

The court in which a contempt proceeding is heard will take judicial notice of all minute entries in the case, including that one ordering the issuance of an injunction and the entry reciting acknowledgment of service. The minutes of a court do not have to be proven in a case pending therein.

3. **NUNC PRO TUNC ORDERS. Presumption of correctness.**

It will be presumed in the absence of evidence shown to the contrary that there were sufficient entries or documents or evidence justifying the entry of an order *nunc pro tunc*.

4. **ILLEGAL SALES OF LIQUOR BY SERVANTS OR TENANTS.**

It will be presumed that the master has knowledge of the act of his agent in illegally selling liquor, and it will be presumed that any so-called lessee of premises, control of which is retained by the owner, is acting for the landlord in carrying on the business of illegally selling liquor.

FROM SHELBY COUNTY.

An appeal from a judgment of contempt pronounced by Chancellor Heiskell, in Part Two.

Devoto v. State.

FRED WADDELL for Appellant.

HEISKELL & RILEY for the State.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

FROM a judgment of conviction of contempt in violating an injunction issued in a nuisance case, Devoto has appealed to this Court and assigned numerous errors. It appears from the transcript that the original nuisance bill was filed upon relation of the Hon. Chas. Bryan, City Attorney, in the year 1914, that plaintiff in error and his brother were the defendants thereto, that they made answer, and that the question of the issuance of a temporary injunction was passed upon by the Court, with the result that a temporary injunction as contemplated by the Nuisance Act was issued or ordered, as evidenced by an entry upon the minutes of the Criminal Court. This minute entry dispensed with formal service of the injunction upon the defendant.

It is not disclosed by the record as to whether there was an actual writ of injunction issued and served except by inference. Whether it was incumbent upon the State to show as a condition precedent to conviction is the most important question presented upon this appeal. The more logical way to treat of this matter is to dispose of the second assignment of error first. This assignment is in substance that the Court was in error in allowing the attorney for the relator to read into the record and to have entered upon the minutes as a *nunc pro tunc* entry an order modifying the alleged temporary injunction with respect to the use of the premises and also with respect to changing the temporary injunction into a permanent one.

It appears that at the time of the trial of this case the records of the Criminal Court were in Nashville, to be

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used as evidence in the impeachment proceedings against Judge Edgington. The relator was therefore unable to adduce original papers and also some of the entries, but the learned trial judge nevertheless and very properly gave the relator permission to have copied into the transcript as legitimate parts of the record upon appeal all the minute entries and records appertaining to this case, including the *nunc pro tunc* order. We are of opinion that this was not an improper direction and that the appellant cannot complain of the certification to this Court of all the entries upon the minutes notwithstanding their absence in Nashville.

But the chief objection is that the alleged *nunc pro tunc* order copied into the bill of exceptions should not be there. We discover that while this *nunc pro tunc* order was not on the minutes at the time of the trial of the contempt proceeding, it was to be elaborated and written and recorded as a part of the minute entries. We are therefore bound to treat it as importing verity and as a part of the record properly before the trial judge in the contempt proceeding. There is no objection that the *nunc pro tunc* order was not properly proven and entitled to space upon the minutes. We are therefore bound to presume that there were data or entries upon books and records such as warranted the Court in finding as a fact that the order presented was passed at the time it purports to have been ordered, and that it was omitted by oversight.

This *nunc pro tunc* order bears on its face evidence of a consent arrangement, and until set aside it must be treated as true in every respect. It recites that the Devotos were enjoined from the illegal sale of liquor and particularly from using certain premises on a street in Memphis, and that the owner thereof desired to repossess herself thereof, and also that the Devotos desired to re-

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frain from the further selling of liquor, and it was ordered that the injunction with respect to the premises be modified and the premises restored, and that as a further consideration the defendants were willing that the temporary injunction restraining them from the selling of liquor be made permanent, and it was so ordered by the Court.

In the first assignment it is claimed that there is no evidence to sustain the conviction for the reason that the record does not show that any injunction was ever issued. There are three answers to this contention. One is that appellant is estopped by the recital in the consent decree. Secondly, he admitted on cross-examination and also by answer to question by the Court that he was under injunction at the time he was attached for contempt. Thirdly, the minute entries of the Court recite the ordering and the issuance of an injunction. It is not incumbent upon the relator in a contempt proceeding for violating an injunction granted by decree to show that the defendant was served with an injunction, nor is it necessary that the relator formally present to the Court as proof the records authorizing the injunction, for it is the duty of the Court to know these things judicially: *Harran v. Mould*, 24 L. R. A., 404, and note. See, also, Vol. 1, Chamberlayne Ev., Section 685. It is urged that this Court decided the contrary two years ago in the case of *State v. Duncan*. This is a misapprehension. We simply held that there must be a record showing the issuance and service of an injunction. We find here Court entries supplying all these requisites. Again, a defendant may be interrogated as to whether he was enjoined, and this is not in violation of the best evidence rule: *Morey v. Hoyt*, 19 L. R. A., 6011. We think the existence of the injunction was competently and abundantly shown. For defend-

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ant is conclusively presumed to be cognizant of recitals in a decree.

Assignment four is a complaint that the Court in allowing relator to ask appellant whether he was under injunction was in error, as this was the letting in of oral proof of the contents of a written instrument. We have just responded to this contention adversely to Devoto. Again, we think that Devoto was concluded by the decree to dispute the issuance of the injunction.

In assignment five it is urged that there is no evidence to show that Devoto had violated the injunction by selling liquor. There is no direct evidence but many circumstances tending to show this. Supplementary to this is the fact that Devoto possessed an internal revenue license and was in charge of premises upon which liquor was dispensed in violation of law. The presumption is that the occupant is aware of that which is done by his servants upon his premises. The trial Court reached the conclusion that Devoto was guilty. This changed the presumption of innocence, and we are unable to say that the evidence preponderates in Devoto's favor. Hence, the judgment must be affirmed. He offers an explanation of the possession of the federal license, but this does not overcome the presumption of an illegal purpose in the obtention of the license, especially as there are strong circumstances indicating a sale: *Brinkley v. State*, 124 Tennessee, 371. The judgment is affirmed and the cause is remanded to the lower Court for execution of the judgment. Appellant and his bondsmen are taxed with the cost of this proceeding in both Courts.

Yarbrough v. Yarbrough.

J. L. YARBROUGH ET AL. v. TOM YARBROUGH.

Writ of certiorari denied by the Supreme Court.

UNLAWFUL DETAINER TO RECOVER A TRACT OF LAND LET TO DIFFERENT PARTIES IN SEVERALTY.

Where the owner of a tract of land let different portions of it to different parties by separate contracts, there can be no recovery of the whole tract in one suit where the parties raises the question of misjoinder.

FROM FAYETTE COUNTY.

Appeal in error from the Circuit Court of Fayette County. S. J. EVERETT, Judge.

BATE BOND for Plaintiffs in Error.

CHARLES STAINBACK for Defendant in Error.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

THIS is an unlawful detainer suit brought by plaintiff Yarbrough against several defendants and terminated in the Circuit Court by peremptory instructions in favor of defendants at the close of the evidence. Plaintiff below has appealed and assigned errors.

It was conceded at the bar by fair and able counsel for appellant that if the proof showed the letting of the premises to have been in severalty and not joint, the Circuit

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Judge acted properly in declining to submit the case to the jury. And this is the law. In such case separate suits must be brought.

After carefully examining the evidence we are of opinion that only one legitimate conclusion can be drawn therefrom and that is that the seventy-one acres sought to be recovered in this one suit were let by different contracts to four different persons, and that under no circumstances could there be a recovery of the whole body of the land against any one defendant. If not, it is plain that under no rule of practice can this suit be maintained, and that the Circuit Judge reached the correct result.

It is true that plaintiff below at one of two places makes the statement tending to show that he had let the whole tract to the defendant Tom Yarbrough and that the latter had sub-leased to his co-defendants. But we repeat that only one deduction can be made from the evidence taken as a whole, and that is that the owners of the land had a contract with each one of the several defendants. In consequence, the judgment will have to be affirmed with cost.

Railway v. Fox.

C., N. O. & T. P. RY v. WALTER E. FOX.

Affirmed by the Supreme Court, 1917.

1. MASTER AND SERVANT. *Rush order. Language of vice principal must amount to. Hurry order.*

A simple suggestion by the foreman of a railroad crew that they get out from a certain place cannot be construed as a rush or hurry order so as to lessen the duty of the servant to exercise reasonable care for his safety.

2. SAME. *Employers' liability act. Assumption of risk. Condition of track with reference to weeds. Knowledge of by member of the crew.*

Where it is clearly shown that the member of a track crew suing for injuries occasioned by his feet becoming entangled in grass and causing him to fall across the main line and be run over was well aware of the condition of the track, there can be no recovery, he being held to have assumed the risk of such accidents, and the Federal Employers' Liability Law does not change this rule.

FROM ROANE COUNTY.

Appeal in error from the Circuit Court of Roane County. SAM C. BROWN, Judge.

HORACE E. CARR for Plaintiff in Error.

CASSELL & HARRIS for Defendant in Error.

MR. JUSTICE HALL delivered the opinion of the Court.

THIS is an action of damages brought in the Circuit Court of Roane County by the defendant in error, Walter

Railway v. Fox.

H. Fox, who will hereinafter be designated as the plaintiff, against the plaintiff in error, Cincinnati, New Orleans & Texas Pacific Railway Company, who will hereinafter be designated as the defendant, to recover for personal injuries sustained by him while in the employ of the defendant.

A trial of the case in the Court below before the Court and a jury resulted in verdict and judgment in favor of the plaintiff for \$5,000.00, from which the defendant has appealed to this Court and has assigned errors.

The plaintiff's case is predicated upon the Federal Employers' Liability Act.

The declaration averred, in substance, that the defendant is a corporation incorporated under the laws of the State of Ohio, and owns and operates a line of railroad running from Cincinnati, Ohio, through the States of Kentucky and Tennessee, to the City of Chattanooga; that it is a common carrier engaged in carrying commerce between the States for hire; that the plaintiff was employed by the defendant as a laborer upon its said line of railroad, and while engaged with other employes in pushing a hand car loaded with lumber upon and along the main track of the defendant, under the orders and directions of its foreman, for the purpose of constructing and repairing the bridges of the defendant, he was ordered by said foreman to rush said car to the point of unloading said lumber in order to get it out of the way of an approaching train, and while so doing the said car jumped the track and ran over and upon the body of complainant, breaking his left leg, and otherwise injuring him. As a specific ground of negligence the declaration further alleged that the defendant had negligently allowed grass and weeds to grow up and along the side of its tracks, which weeds and grass tripped complainant, and prevented him from getting before said push car.

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To this declaration the defendant filed a plea of not guilty.

Upon the trial in the Court below, at the close of plaintiff's evidence, the defendant moved the Court to direct a verdict in its favor, which motion was renewed at the close of all the evidence. This motion was overruled by the Court, and the case was submitted to the jury with the result hereinbefore stated.

By the first assignment of error it is insisted that the Court committed error in refusing to sustain the defendant's motion for a directed verdict, made at the conclusion of the plaintiff's evidence, and renewed at the close of all the evidence. This assignment of error calls for a consideration of the facts, which are as follows:

The defendant owns and operates an interstate railroad from the City of Cincinnati, through a portion of the States of Ohio, Kentucky and Tennessee, to Chattanooga. The plaintiff was a member of a bridge gang working on its tracks and bridges under the orders and directions of the defendant's foreman, one Ferguson. Just a few moments prior to the accident, which occurred on the 12th day of August, 1914, the plaintiff, with other employes of the defendant, had loaded a push car with lumber at the north end of the defendant's yards at Evansville, Tennessee, preparatory to transporting said lumber to a point below the south end of the yards, about a mile and a half distance, where the lumber was to be used in making forms for concrete blocks that were being used in the construction of the defendant's bridges and culverts. This lumber was loaded on said push car, which was situated on one of the side tracks of the defendant in said yards. About the time they got the lumber loaded plaintiff says that some member of the crew made the remark that a train had whistled from the north, and that they had

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better get out of there. He says the foreman, who was on a car some distance in front of the crew with which he was working, called to them, saying, "Come on, boys; let's get out of here," and motioned his hand to the plaintiff and his co-workers to move the car, which they had just loaded, forward; and take it to the south end of the yards before the train came. Plaintiff testified that they began pushing the car along the track as rapidly as they could. He says he was standing at the side of the car near the front end, and was assisting in pushing it along the track. The car had passed the frog of the switch, and was just entering on the main line, and was going at the rate of four or five miles per hour, or about as fast as a man could trot, when plaintiff says that he tripped over some grass and weeds that were growing beside the track and fell in front of the car, and one of the wheels of the car passed over his left leg, crushing his ankle, and otherwise injuring him. The evidence shows that when the car passed over the plaintiff's leg, it was thrown from the track. He says he understood the foreman's order when he said, "Come on, boys, let's get out of here," to be a rush order, and meant that they were to hurry with the car to the point of unloading. He says the grass and weeds growing beside the track at the point where he was injured was about a foot high.

The evidence shows that he was entirely familiar with the condition of the track at the point of the accident, because he admits that he had been passing along that particular point for a week or ten days prior to his injury, and knew of the presence of the grass and weeds growing beside the track. The evidence shows that it was usual for the Railway Company to keep the grass and weeds cut along its tracks, but that greater care was exercised

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in keeping the grass and weeds cut along the main line than along the side tracks.

The plaintiff's evidence is in conflict with all the evidence in the case as to how the accident occurred. The other witnesses who testified as to how the accident occurred say that no train was approaching, and that no announcement was made by any member of the crew, or by the foreman, that a train was approaching from the north. The foreman denies that he gave any signal to the plaintiff and those working with him for the car to move forward. All the evidence, except the testimony of the plaintiff, shows that the push car was being moved in the usual and ordinary way, and that they were not endeavoring to get out of the way of any train. The car was standing on the side track when the plaintiff claims that the order was given by the foreman. All of the witnesses who testified, except the plaintiff, say that the car was moving in the usual and ordinary way, and that plaintiff attempted to board the car while it was moving, and fell in front of it.

The evidence shows that it was usual for the employes, engaged in pushing the car, to push it rapidly until the car was given sufficient momentum to carry it along the track without pushing, and then the employes would jump on the car and ride until it slowed down again, and then they would get off and push the car along as before. The other employes testifying in the case, both for the plaintiff and the defendant, say that this was being done at the time of the accident, and that plaintiff, while endeavoring to board the car, was thrown in front of it. However, the jury found in favor of the version of the plaintiff as to how the accident occurred, and the circumstances under which it occurred, and the jury's findings are conclusive upon all controverted questions of fact. There is no con-

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troversy, however, as to the fact that the car was standing on the side track at the time the plaintiff claims the order was given by the foreman, and there is no evidence tending to show that the approaching train intended to come in on this side track, or that the foreman, or any other member of the bridge gang, had any reason to believe that it would come in on that track. Nor is there any evidence that it did do so.

We think the evidence fails to show that the order given by the foreman was a "rush order," or that there was any emergency which called for the hastening of the movements of the push car, because the undisputed evidence shows that it was standing on the side track and was out of danger. There was nothing in the order of the foreman that indicated that the car was to be moved in haste. According to the plaintiff's testimony, he simply said, "Come on, boys, let's get out of here," and motioned to them to move the car forward.

Nor is there any controversy as to the fact that the plaintiff was entirely familiar with the condition of the track at the point of the accident. He knew that the weeds and grass were growing along the track at that point. He says that he had noticed the weeds and grass along there for a week or ten days prior to the accident.

We are of the opinion, therefore, that if it be conceded that the defendant were guilty of negligence in permitting the grass and weeds to grow beside the track, the plaintiff must be held to have assumed the risk incident to the same, because he was entirely familiar with the condition that existed. He knew just as much about the probability of the grass tripping him while pushing the car rapidly over the track as did the defendant. The defect in the track was not only obvious and patent, but the plaintiff had full knowledge of it, and the danger of being tripped

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by the grass as he hurriedly passed over it was just as well known to him as it could have been to anybody.

It is a well settled rule of law in this State, and all other jurisdictions that we have any knowledge of, that where the servant has knowledge, or means of knowledge, of dangerous defects, but continues in his employment, he assumes the risk thereof: *Smith v. Dayton Coal, Etc., Co.*, 115 Tenn., 543; *Heald v. Wallace*, 109 Tenn., 3461; *Corbett v. Smith*, 101 Tenn., 368; *Brewer v. Tennessee Coal Co.*, 97 Tenn., 615; *Brown v. Electric R. Co.*, 101 Tenn., 252; *Ferguson v. Phoenix Cotton Mills*, 106 Tenn., 236; *Railroad Co. v. Edwards*, 111 Tenn., 31.

But it is insisted that under the Federal Employers' Liability Act that there can be no assumption of risk by the servant of a danger growing out of the negligence of the employer.

This contention, however, is not well grounded. The risk incident to a known or obvious defect at the place, appliances, or machinery in which or with which the servant is put to work by the master is assumed by the servant under the Federal Employers Liability Act, except in cases where the negligence of the master consists of the violation of some statute enacted for the safety of its employes, which contributed to the injury or death of such employe: *Seaboard Air Line R. Co. v. Horton*, 233 U. S., 503; *Jacobs v. Southern Railway Co.*, 241 U. S., 231.

In this latter case the negligence complained of was that the Railway Company had caused or permitted to be within dangerous proximity to its tracks a pile of loose cinders, over which plaintiff stumbled, fell and was drawn under the locomotive (he being a locomotive fireman) while attempting to board it while the same was moving along the track. The Court held that Jacobs assumed the

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risk incident to the pile of cinders, he knowing of its presence beside the track, but in his testimony said that he temporarily forgot it was there. The Court said:

“The language of Section 4” (Federal Employers’ Liability Act) “demonstrates its meaning. It provides that in any action brought by an employe he ‘shall not be held to have assumed the risks of his employment in any case where the violation of said common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe.’ It is clear, therefore, that the assumption of risk as a defense is abolished only where the negligence of the carrier is in violation of some statute enacted for the safety of employees. In other cases, therefore, it is retained. And such is the ruling in the Horton case, made upon due consideration and analysis of the statute and those to which it referred. It was said: ‘It seems to us that Section 4, in eliminating the defense of assumption of risk in the cases indicated, quite plainly evidences the legislative intent that in all other cases such assumption shall have its former effect as a complete bar to the action.’ And there was a comparison made of Section 4 with the other sections and the relation and meaning of each determined and the preservation by the statute of the distinction between assumption of risk and contributory negligence, which was pronounced ‘simple’ although ‘sometimes overlooked.’ ”

Without further elaboration, we are of the opinion that the plaintiff assumed the risk incident to the growing grass beside the defendant’s track, and which he claims was the cause of his injury. The judgment is reversed and plaintiff’s suit is dismissed.

Ramsey v. County.

D. L. RAMSEY v. GIBSON COUNTY.

Writ of certiorari denied by the Supreme Court.

PUBLIC OFFICIALS OF COUNTY. *Contracts with. Invalidity.*

A party engaged by county workhouse commissioners as cook and purveyor for the county hands cannot recover from the county for provisions used by him in furnishing meals, notwithstanding the price asked is reasonable and consumption of goods admitted.

FROM GIBSON COUNTY.

Appeal in error from the Circuit Court of Gibson County. THOMAS N. HARWOOD, Judge.

HILLSMAN TAYLOR for Plaintiff in Error.

SYD R. CLARK for Defendant in Error.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

THE question involved upon this appeal is the right of a man who was in the service of the workhouse commission and of the superintendent of Gibson County, and whose duty it was to make purchases of supplies could recover of the county for goods sold by himself to the county and used in feeding prisoners. The matter involved is \$46.40. The Circuit Judge denied recovery and plaintiff has appealed and assigned errors.

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The only facts which need be mentioned are these:

Gibson County has a workhouse system of which the Sheriff is the superintendent. He had Ramsey employed as cook and purveyor during the months of April and May, 1916. Ramsey, while performing his duties, became the owner of a small store situated not far from where the workhouse, a portable structure, was stationed at that time. He was not only employed to cook, but was authorized to make purchases of supplies. He furnished from his store to himself as cook and purchaser goods to the amount above named. We shall assume that they were furnished at reasonable prices and were consumed by the prisoners and that the county became the recipient of value to that extent. It seems that the superintendent thought the account proper, but it was never certified for payment as prescribed by the Workhouse Act.

The county resisted payment upon the two grounds that the purchases were not made and the account certified as required by the workhouse law, and that the sale was by and through an officer or agent who was prohibited both by statute and by the common law from making such sales and recovering therefor. We are of opinion that the Circuit Judge reached the proper results. That it is not material to determine whether Ramsey was such an official as cannot deal with the county under Shannon's Code, Section 1133. We think that under no circumstances can the Courts recognize the right of a man occupying the position of Ramsey to recover upon his contracts. Sound public policy forbids this. Nor is it controlling that the purchases are at reasonable prices and that the county gets the benefit and that the seller has not taken advantage of the situation. The rule forbids the giving of any validity to such contracts because of the vast opportunities open for fraud and because such contracts are in flat contradic-

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tion of the soundest ethical and juridical principles. See *Madison County v. Alexander*, 116 Tenn., 689, and cases there cited.

Some maxims universally accepted demonstrate the correctness of our conclusion. One is, *Idem agens et patiens esse potest*, the meaning of which is that a man cannot both be agent and master, nor doer and recipient, nor seller and buyer, at one and the same time. This is a derivative of the old maxim that a man cannot be a judge in his own cause or matters. And the Christian application is that a man cannot serve both God and mammon. The law forbids the assumption by anyone of a position where his interest and his duty will conflict.

In the instant case the self-interest of Ramsey prompted him to obtain the highest price for his goods. His duty to the county required that he buy provisions at the lowest price. It can readily be seen, therefore, that a vice destructive of contracts thus made inhered in the situation. The judgment is affirmed with cost.

Railway v. Buchanan.

N., C. & ST. L. RAILWAY v. MRS. S. B. BUCHANAN.

Writ of certiorari denied by the Supreme Court, 1916.

1. CARRIER AND PASSENGER. *Passenger alighting. Movement of train. Unusual jolt.*

The general rule is that a passenger injured by a jolt or movement of a train must show that it was an unusual one. An exception is where the train has come to a full stop at the station and the passenger is alighting at the request of the carrier. In such case it is the duty of the carrier to refrain from moving the train without notice or warning.

2. SAME. *Unusual movement. Question of fact.*

Whether the movement of a train was unnecessary or unusual is a question of fact for the jury and not to be concluded by opinions of witnesses.

3. PRACTICE. *Plaintiff not precluded from reliance on testimony of other witnesses not in harmony with his own.*

A plaintiff testifying in his own behalf is not denied the right to have the evidence of his witnesses considered simply because that evidence may be in apparent conflict with his own.

4. SAME. *Remarks of court upon rejecting evidence.*

A trial judge may state in the presence of the jury his reason for declining to admit a certain line of testimony.

5. SAME. *Supplying books to an expert.*

And the trial judge may supply a professional witness with a dictionary to enable the latter to make a technical statement plain.

6. SAME. *Withdrawing incompetent evidence. Presumption as to.*

It will be presumed that emphatic instructions by the court to disregard incompetent evidence admitted were obeyed by the jury when there is nothing in the evidence or the conduct of counsel offering it indicating any sinister purpose in proffering the testimony and when it is reasonably clear that the jury did not consider the evidence.

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7. **SAME.** *Charge of the court: criticizing single paragraphs. Must be considered as a whole.*

The charge of the court must always be considered as a whole. Repetitions are to be discouraged; and the court is under no obligation to restate the entire case in each instruction.

8. **EVIDENCE.** *Confirmatory statements. Declarations of employe.*
Statements of a wrong-doing servant made to his employer a day or so after the accident are not competent as corroborative evidence.

FROM DAVIDSON COUNTY.

Appeal in error from the Circuit Court of Davidson County. THOMAS E. MATTHEWS, Judge.

FRANK SLEMMONS and CORNELIUS HALL for Plaintiff in Error.

PARKS & BELL for Defendant in Error.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

THIS was an action by Mrs. Buchanan to recover damages of the railway company for injuries claimed to have been sustained by her while a passenger. The jury trying the issues returned a verdict of \$5,500.00 in her favor. The Circuit Judge declined to disturb it on motion for new trial, and pronounced judgment, to reverse which this appeal is prosecuted by the company. We shall dispose of the eight assignments of error made in the order in which they appear on the brief.

The first assignment is that there is no evidence to sustain the verdict. Plaintiff below inserted three counts

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in her declaration, in one of which she averred that she was a passenger with Tullahoma as her destination and that when the point was reached the train came to a full stop and that she arose and started to the door preparatory to alighting, when the employes gave the train a sudden lurch or jerk, throwing her to the floor and severely injuring her; in the other counts she alleged that as the train approached the station it began to slow down, and that she arose at the bidding of the servants and was approaching the door to alight, when there was a sudden or unusual jerk, or jar, causing her to fall.

The case made by her in her testimony was the one which she set out in her first count. That is to say, her testimony was in substance that she remained in her seat until the train came to a full stop at Tullahoma, that she got up and was walking toward the door or was near the door in the act of passing to the platform of the car when there was a sudden jerk, jar or movement of the train which caused her to fall back and receive her injury. It is well also to note that that count of hers which embodied this phase of liability was repeated by the judge to the jury in his instructions. It is also to be observed that the theory insisted upon by learned counsel for Mrs. Buchanan in the trial Court and in this Court was that of a passenger who, at the invitation of the carrier and also pursuant to her duty, arose after the train had reached its destination and had come to a full stop and was in the act of alighting when, by sudden or unexpected movements of the train which should have remained still, she was precipitated to the ground.

It is urged by able counsel for the railway company that there can be no recovery in this case or in any case where the passenger is injured as the consequence of ordinary, usual or inseparable jolts of a passenger train, and that

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in the absence of an unusual and negligent movement of the train, there can be no recovery. This seems to be the rule in general: *Railroad v. Brooks*, 125 Tenn., 260; *McGann v. Railway*, 18 L. R. A. (N. S.), and note, and also *Railway v. Stone*, opinion by Justice Moore of this Court in 1912; see, also, 4 R. C. L., p. 1210. But it must be remembered that cases of this line commonly have reference to injuries received while the train is between stations or while it has approached stations and is in the act of coming to a full stop. It is universally held that in such case the jolt must be unusual and the result of negligence. This seems to have been the conception of the learned trial judge in the case at bar, for he distinctly told the jury that there could be no recovery unless the jar was unusual and was caused by negligence. The jury was so instructed more than once.

If we treat the case as dependent entirely upon the above theory, it must be observed that the evidence to sustain it is almost negligible. But at the same time its absence is not so clear as to warrant the assertion that there is no material testimony tending to show negligence. The evidence of Mrs. Whittaker, a passenger alighting with Mrs. Buchanan, is to the effect that some sort of movement of the train threw the latter to the floor while she was walking toward the door. It is true that she did not think it an unusual movement. Yet it cannot be denied that this was a question for the jury. The throwing of a passenger down was certainly an unusual incident, and when this is considered in connection with the testimony of Mrs. Buchanan as to the care she was exerting and her inability to maintain her equilibrium because of the jar, we are unable to say that the jury were without material basis for their verdict. We repeat that the preponderance of evidence is against the verdict; but it is so firmly fixed

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in this State that the Appellate Courts will not disturb such a verdict that it would be folly for an intermediate Court undertaking a criticism. It is true this is a judge-made rule and could well be receded from; and it should be in many cases relaxed. But its modification rests with the highest tribunal of the State.

But as before observed, Mrs. Buchanan had the right to go to the jury upon mere proof that after the train came to a full stop and she was in the act of alighting, the servants caused the coach to move unexpectedly in such way as to throw her off her balance. There is a well defined distinction between cases of passengers approaching the door of a coach after the train has reached a standstill, and those where the passengers are preparing to alight before the train has come to a stop. In the former case, there seems to be an obligation to keep the train still until the passengers shall have alighted: 4 R. C. L., p. 1245, and cases there cited. It seems that under these authorities any movement after the train has come to a stop which throws the passenger down is a negligent act. And this is logical in view of the well understood duty of the passenger to get out of the coach after the train has arrived at the town of his destination, and in the further view that the carrier's servants must be at the discharging point to give assistance and direction to passengers. In such case it is not illogical to hold that the carrier is under obligation to keep the train still while the passenger is complying with the implied direction to get off. See as bearing upon this point some observations in the case of *Railroad v. Smith*, 110 Tenn., 197. It must not be overlooked that the testimony in the instant case tends to show that the employes knew that Mrs. Buchanan was in the act of alighting or approaching the door for that purpose. We overrule the first assignment of error.

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In the second assignment of error it is stated that the verdict is so excessive as to indicate passion, prejudice or caprice. We are of opinion that this assignment is well made and that it will have to be sustained and made the ground of reversal unless suggestion of remittitur hereafter referred to be accepted. We need not elaborate on this further than to say that the verdict strikes us as entirely too large in view of Mrs. Buchanan's age, previous weakened and nervous condition and subsequent intermittent and not total disability.

The basis of the third assignment was the action of the Court in permitting Mrs. Buchanan to prove that she had several minor children and that she had to labor industriously because of this. We are constrained to overrule this assignment for a number of reasons. Our first observation is that the assignment is faulty in that reference is made to the motion for a new trial as the source from which its grounds were taken. The recitals of a motion for a new trial are not evidence nor verification of the things contained therein. Again, the statements of such motions must be predicated on something occurring antecedently. Hence, there should be in the assignment and brief direct reference to the transcript of the main case. However that may be, upon turning to the transcript we find that the testimony urged as incompetent was withdrawn by the Circuit Judge. Ordinarily this would have concluded the matter.

But it is urged as usual that the jury were inoculated with the poison, were prejudiced in favor of the lady, and that subsequent instructions were futile. Many cases having direct bearing on the consequences of the wrongful admission of testimony subsequently verbally or formally withdrawn are cited. Some of them are well decided. But an examination will reveal the fact that there was some-

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thing vicious or sinister surrounding the introduction of the testimony, or a persistent repetition after the Court had held the evidence incompetent. It can be said of the case at bar that counsel immediately refrained when the Court intimated that he thought the evidence incompetent. It may also be remarked that the question was naturally prompted by the line of inquiry, perfectly legitimate, as to Mrs. Buchanan's earning capacity. The fact that she had helpless children was not pertinent, and the Court properly excluded it. But we are going to act upon the assumption that the jury obeyed his instructions or that if they did not, the error can be cured by remittitur.

The fourth assignment of error is in substance as follows: Because the Court erred in refusing to admit the statement of Joe Beene, witness for defendant, made four days after the accident. This is not a good assignment. Such assignment must be complete upon its face and must not suggest the necessity of going to the transcript to find out what evidence was excluded: *Nance v. Smith*, 110 Tenn., 349.

The substance of the fifth assignment is that the Court was in error in making some observations during the examination of witness Beene to the effect that a statement made by Beene four days after the accident was self-serving, and was after the controversy and while litigation was in contemplation, and that statements taken by corporations of their servants were undoubtedly taken in contemplation of a lawsuit and that there was just as much motive to make a false statement at that time as at the trial.

This remark was called forth by the earnest effort of counsel to have admitted a statement made by Beene four days after the accident as to how he had slowed down his train at Tullahoma. We do not wish to be understood as commending the language of the judge, nor as treat-

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ing such statements in all cases as harmless. They should not be made in the presence of the jury. But there are sometimes extenuating circumstances or reasons which lessen the enormity of the conduct of the trial judge. We are of opinion that such evidence was not competent, and that the Court might state his reasons for so holding; and we can see that the judge here was giving his reason for treating the testimony as inadmissible. The Court could have used more diplomatic language and should have refrained from any intimation that either the witness or counsel was willing to perpetrate a fraud. At the same time we feel constrained to the view that it will not do to make this remark of the judge the basis of a reversible error, especially as there was no exception by counsel at the time and no effort made to have its effect neutralized. It is true that objections to the remarks of the judge are not always a prerequisite to a reversal if harm vitally affecting the merits can fairly be attributed to the statements made by him. But it is always significant that no objection was interposed.

It will be noted that we have not elaborated on our statement that the evidence tendered was incompetent. We have immediately above ruled that the proffered testimony is not before us by proper assignment, and this would excuse us from elaborate treatment. We shall nevertheless observe that under the rule laid down in *Spurlock v. Brown*, 91 Tenn., 241, prior statements of a witness in accord with his evidence on the trial cannot be proven except in those cases where it is clear that no motive for misrepresentation was present. In addition, we are persuaded that it would be dangerous to countenance the practice of a party offering as confirmatory of his witness a statement made by him at the first interview. It might be naturally assumed that the desire of the witness to jus-

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tify himself would bias his testimony to some extent, notwithstanding his integrity.

The predicate of the sixth assignment of error was this: Dr. Glenn, a witness for the defendant below, was on the stand, undertaking to explain or describe the bone at the end of the spinal column known as the coccyx. It seems that he was unable to make himself clear. At this juncture the Circuit Judge handed him Gray's Anatomy with the suggestion that it might possibly aid him. We see nothing prejudicial in this. It is argued that it was an indication of the leaning of the Court toward the side of the plaintiff below; it is also stated that it was an unusual occurrence, in that Gray's Anatomy was not a law book nor customarily found in a court room. The members of this Court know that the volume mentioned is a well-known treatise, and one of immense value to the laymen in ascertaining the human makeup. Nor is there anything reprehensible in allowing a non-professional to resort to it for the purpose of making vivid an intricate part of the body. We overrule this assignment.

In the seventh assignment it is specified as error that the Court charged in substance that the plea put the burden of proof upon the plaintiff to prove at least one of her three counts substantially as made, and that she was not bound to prove it beyond a reasonable doubt, but that she might do so by slight preponderance; and, further, that if after they considered all the evidence they found the greater weight on the side of plaintiff's case as alleged in any one or more of her three counts, then the verdict should be for the plaintiff. Otherwise not. We shall notice only the criticisms urged. In the first place it is said that the instruction ignored entirely the element of negligence. There is nothing in this. The Court several times stated that it must be shown that the carrier was

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guilty of negligence before a recovery could be had. It is next said that the Court had failed to tell the jury what was in the second and third counts and that he had thereby omitted the duty of stating and explaining the issues to the jury, and that a recovery was had upon an issue not submitted. This part of the charge is not as consistent as it should be, but we do not believe that harm resulted to the defendant below. As a matter of fact, the testimony of plaintiff corresponded more closely with the first count than to the others; but this did not preclude plaintiff from going to the jury upon the evidence which might be found in the testimony of the other witnesses supporting her other counts. The averments of the first count and subsequent instructions clarified the issue enough to enable the jury to comprehend all the points. We overrule this assignment. Charges must be considered as a whole.

In the eighth assignment it is insisted that the Court was in error in using the following language: "And on the whole case as shown by a preponderance of all the evidence, you should award plaintiff such a sum of money as would be a fair, reasonable and just compensation for her injuries." One criticism is that the language is suggestive of predilection of the Court for the side of plaintiff, and that it is a virtual direction to return a verdict for her. There would be something in this if it stood alone, but it will not bear such construction when considered in connection with that which had preceded and that which follows, which must always be done. Again, it is said that the Court gave undue emphasis to the measure of damages and thus impressed the jury that they must make a liberal award. The Court did use more expletives than necessary, but we are unable to say that this had anything

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to do with the result. Moreover, our suggestion of remittitur will take away any possible harm.

It results from the foregoing that we are going to overrule all the assignments of error excepting the second, which deals with the amount of the verdict.

NAT HUCKABY v. ELSIE WINCHESTER.

Writ of certiorari denied by the Supreme Court, 1917.

SLANDER. *Spoken words charging that plaintiff was a hermaphrodite not action per se. Special damages necessary.*

Spoken words charging that the plaintiff was a hermaphrodite are not actionable *per se*; and before the plaintiff can maintain an action for language so uttered she must allege and prove special damages.

FROM MAURY COUNTY.

Appeal in error from the Circuit Court of Maury County. W. B. TURNER, Judge.

J. H. DINNING and W. H. HOPKINS for Plaintiff in Error.

H. P. FIGUERS for Defendant in Error.

MR. JUSTICE HALL delivered the opinion of the Court.

Huckaby v. Winchester.

THIS is an action of damages brought by the defendant in error against the plaintiff in error, Nat Huckaby, in the Circuit Court of Maury County, to recover for oral slander.

There was a trial before the Court and a jury, which resulted in a verdict and judgment of \$1,250.00 in favor of the plaintiff below, from which the plaintiff in error appealed to this Court, after his motion for a new trial had been overruled, and errors have been assigned.

The alleged slanderous words, while differently laid in the several counts of the declaration, are, in substance, that the plaintiff in error stated to divers persons, within six months next before the commencement of the present suit, that defendant in error was a "morphodite," meaning thereby that she was an hermaphrodite or bi-sexual person, which imputation was falsely and maliciously made, and on account of which defendant in error was greatly damaged.

A demurrer was interposed to the several counts of said declaration by the plaintiff in error, setting up the defense that the alleged slander was not actionable *per se*, and as no special damage was averred, defendant in error could not maintain her suit. The demurrer was overruled. To the action of the Court in overruling his demurrer plaintiff in error excepted. He, thereupon, filed pleas to the declaration, setting up the defense:

First, That the alleged words were spoken under such circumstances and upon such an occasion as rendered them privileged. It is not necessary to set out this plea in detail. And, second, The general issue, or not guilty.

The first error assigned, and the one which we think is determinative of the case, is, that the Court erred in not sustaining plaintiff in error's demurrer to the declaration,

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the same being seasonably filed, and in not dismissing plaintiff in error's suit.

The question presented for determination is whether the alleged slanderous words averred in the declaration are actionable *per se*. No special damage is averred, and before defendant in error can maintain her action the words alleged to have been spoken must be actionable *per se*: *Cheatham v. Patterson*, 125 Tenn., 437; *Rogers v. Rogers*, 11 Heis., 757; *Smith v. Smith*, 2 Sneed, 473; *Cohen v. Pinson*, 1 Higgins, 93; Newell on Slander and Libel (1914 Ed.), pp. 40-41, Section 53.

Until the case of *Smith v. Smith*, 2 Sneed, 473, the rule in this State was that the common law gave no action for defamatory words not producing special damage, and confined the action of slander to words imputing positive crime: *Williams v. Karns*, 4 Humph., 10. In that case the rule was extended to include cases where the charge "imputes an offense, whether a crime or misdemeanor, involving moral turpitude, and for which an indictment or presentment will lie, then the words that impute it are in themselves actionable." The Court quoted with approval from Chief Justice De Grey in *Onslow v. Horne*, 3 Wils., 177, as follows:

"The rule is that the words must contain an express imputation of some crime liable to punishment, some capital offense, or other infamous crime or misdemeanor, and the charge upon the person spoken of must be precise."

The rule has been thoroughly established in this State, and in practically every other jurisdiction of the United States, that the alleged defamatory words must contain an express imputation of some crime, some felony, or misdemeanor, involving moral turpitude, before they will be actionable *per se*; that is, without special damage being averred and proven.

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“Moral turpitude is defined as an act of baseness, villainess, or depravity in the private and social duties which a man owes to his fellow man, or to society in general, contrary to the accepted and customary rule of right and duty between man and man.” Words and Phrases, Vol. 5, 4508, and the cases there cited.

There is only one exception in this State to this rule of the common law, and that exception exists only by virtue of positive statute, and applies to the charge of adultery or fornication. Ch. 6 of Public Acts of 1805, Shannon’s Code, Section 5155.

The case of *Malone v. Stewart*, 15 Ohio, 319, is the only case cited by counsel to sustain the contention of defendant in error that the alleged words are actionable *per se*. In that case it was held that to charge a female orally with being an hermaphrodite is actionable without alleging special damages.

The rule announced in that case seems to be contrary to that announced in the other jurisdictions of the United States. It is certainly contrary to the rule repeatedly announced by our own Supreme Court.

In the case of *Alfele v. Wright*, reported in 93 Am. Dec., 615, rendered by the Supreme Court of Ohio at its December term, 1867, the holding in the case of *Malone v. Stewart* is characterized as an “innovation” upon the common law rule. In that case the Court said:

“The only innovation upon this common law rule which has been hitherto made in this State is regarding slander of the female. Words charging a woman with want of chastity, or which have a tendency to wound her feelings, bring her into contempt, and prevent her from occupying such position in society as is her right as a woman, are actionable in themselves. But this exception has never

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been extended to the other sex where the words were of a similar character, and we feel neither disposed nor authorized to extend the innovation."

In the case of *Abrams v. Foshee*, 3 Iowa, 274, 66 Am. Dec., 77, in speaking of the case of *Malone v. Stewart*, *supra*, the Supreme Court has the following to say:

"The case of *Malone v. Stewart*, 15 Ohio, 319 (45 Am. Dec., 577), we do not believe to be law. It has not been followed, as far as we have been able to examine, by any other Court; but, on the contrary, its correctness has been denied or questioned, and, we think, with propriety. 1 Am. Leading Cases, 116."

In *Coburn v. Harwood*, 12 Am. Dec., 45, the Supreme Court of Alabama, in discussing the rule announced in the case of *Malone v. Stewart*, said:

"And on similar grounds it was held in *Malone v. Stewart*, 15 Ohio, 319, that it was actionable *per se* to charge a woman with being a hermaphrodite. The Court said, 'We hold it a sound principle of law that words spoken of a female which have a tendency to wound her feelings, bring her into contempt, and prevent her from occupying such position in society as is her right as a woman, are actionable in themselves.' This extraordinary doctrine has not been extended to any other class of cases within that State. It hardly needs to be stated, that, except where it is otherwise provided by statute, or where the punishment of fornication and adultery is such as to bring them within the rule of *Brooker v. Coffin*, charges of those offenses are not deemed actionable *per se*."

Though we may feel ever so much that the false charge by the plaintiff in error concerning the defendant in error was both malicious and outrageous, we do not feel warranted, or even that we have authority, to extend the rule

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which has been repeatedly announced by our Supreme Court that slanderous words orally uttered, to be actionable, must impute some offense, either a crime or misdemeanor, involving moral turpitude, and for which an indictment or presentment will lie.

It results that we are of the opinion that the plaintiff in error's demurrer should have been sustained. The judgment of the Court below will therefore, be reversed, and defendant in error's suit will be dismissed with costs.

LEWISBURG & NORTHERN RY. CO. v. S. M. MINTON.

Writ of certiorari denied by the Supreme Court, 1916.

1. **JOINT TORT FEASORS.** *Joint verdict without evidence showing coöperation.*

Where several parties are jointly sued for inflicting damages and no evidence is adduced showing coöperation, but much testimony showing separate action in producing a result, a joint verdict will have to be set aside for lack of evidence to support.

2. **SAME.** *Burden of proof as to joint tort feasons.*

Where several defendants to an action of tort urge that there was no coöperation or concurrent action the burden is on the plaintiff to show this concert of action before a joint verdict can be rendered.

3. **DAMAGES TO REALTY.** *Cost of restoration.*

It is always competent for the owner of realty suing a trespasser for damages inflicted to show the reasonable cost of restoration as a part of his recovery.

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4. EVIDENCE. *Opinion of witness as to cause.*

It is improper to allow a witness to express the opinion that certain blasting which is the basis of an action caused the falling of plaster in the house of the plaintiff.

5. SAME. *Evidence as to other occurrences. Collateral issues.*

It is incompetent in an action of damages for injuries inflicted by blasting to prove the results of other blasts at other times and their effects upon other property.

FROM DAVIDSON COUNTY.

Appealed in error from the First Circuit Court of Davidson County. THOS. E. MATTHEWS, Judge.

P. M. ESTES for Plaintiffs in Error.

M. T. BRYAN for Defendant in Error.

MR. JUSTICE MOORE delivered the opinion of the Court.

THIS action was instituted before a justice of the peace by defendant in error against the Lewisburg & Northern Railroad Co., Walton-McDowell Co., Walton Co., or Walton & Co., and the N., C. & St. L. Railway Company to answer the complaint of R. E. Minton in a plea of debt due by damages to his home and residence done by blasting in excavating and constructing the Lewisburg & Northern Railroad and a portion or branch of the N., C. & St. L. railroad, which damages consists mainly of breaking and shattering the plaster and wall paper of said house and of injuries to the doors and windows thereof, all of a temporary nature, under \$500.00. The case was heard by the trial judge and a jury, when a verdict was re-

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turned by the jury in this language: "The jury on their oaths do say they find the matters in controversy in favor of the plaintiff and assess the damages at \$500.00." The verdict does not say whether it is against all of the defendants or some of the defendants, or only one of the defendants. There is no verdict against any defendants, but the matters in controversy are found in favor of the plaintiff and his damages are assessed at the amount stated. Thereupon a judgment was rendered in favor of plaintiff against the four defendants named *supra* for the sum of \$500.00. These four defendants moved for a new trial, which was overruled, and they have appealed to this Court and assigned errors.

In view of one question raised on this appeal the verdict of the jury becomes somewhat important, in that it fails to state against what defendants it was returned. The first assignment filed by appellants is that there is no evidence to sustain the judgment of the Court, and this assignment is based on the ground that there is no evidence to show that these four defendants were joint tortfeasors, or that they acted in concert in producing the injury for which this suit is brought. We have carefully examined this small record, and in fact the writer of this opinion has read it more than one time, in order to find, if possible, any evidence that warrants a joint verdict and judgment against these four defendants. If our investigations were confined alone to the proof of plaintiff below it would be impossible to find any evidence that convicted either of these defendants of doing plaintiff's house any injury, in any way or at any time. Plaintiff testified in his own behalf, and all he says in regard to who committed the injury to his house is that, "In the spring or summer of 1913 a deep cut was made for the railroad through Flat Rock. The cut was thirty-five or forty feet deep, prin-

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cipally through rock and was made by blasting. The cut was about a block and a half distant from his house, and the blasting cracked the paper and busted the plaster." The above quotation is all we find in this testimony about when the blasting was done, or the purposes for which it was done. He nowhere states in any part of his evidence who did the blasting or who had it done. He does state that a deep cut was made for the railroad through Flat Rock, but fails to say for what railroad this work was done or who did it or for whom the parties doing the blasting were at work. It may be that he meant the Lewisburg & Northern Railroad, or it may be that he meant the blasting was done for the N. C. & St. L. Railroad, and, perhaps, the jury so understood him. But the above is all of his evidence that indicates in any degree for whom this blasting was done. The only fact clear from his statement is that it was done in the summer of 1913 for the railroad through Flat Rock.

This Court cannot judicially know that either of the railroads named were built through Flat Rock or in that neighborhood, and there is no evidence to indicate that they were. His next witness simply says he was "familiar with the house prior to the construction of the railroad," and does not again refer to any railroad in his testimony. Mrs. Minton was called to the stand, but fails to mention any railroad or even to use the word "railroad" in her testimony. The two defendant railroad companies were nowhere mentioned by her. The same is true as to the next four witnesses examined by plaintiff. All of these witnesses testify about blasting being done near plaintiff's house without saying who did it, why it was done or whether either of the defendant railroad companies had anything to do with it, or whether either of the other defendants had any connection with it. Plaintiff examined

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his daughter, and all she mentions is that the blasting was done near the house, which caused the plaster to crack. We have mentioned the number of witnesses examined by plaintiff in the Court below and neither of them in the remotest degree connect any of the defendants with the blasting so frequently mentioned by them. If defendants had placed no evidence before the jury and had stood upon the testimony of plaintiff, they would have been entitled to a directed verdict for want of any evidence showing either of them was guilty of the tortious act of which complaint is made in the warrant sued out in this case.

The warrant specially charges the defendants with jointly and in concert committing this tortious act upon complainant's house, but the proof wholly fails to sustain the averments or statements set out in the warrant. One of the defendants' witnesses testified that the defendant Walton & Co., was the trade name for a man by the name of Samuel Walton, and that "Walton & Co. did the work of making the cut that ran in a southerly direction from the Nolensville Pike passing in about a block and a half in front of the Minton property. This was a deep cut through the rock. Practically all of this work had been let by the L. & N. Railroad to Walton-McDowell Co., and that company had subcontracted that part of the work to Walton & Co. After that contract had been executed, the N., C. & St. L. Railroad had a strip of the cut taken out and for the execution of this work it made a contract with Walton & Co." Another one of the defendants' witnesses testified that he was general manager of Walton-McDowell Co., and had general supervision over the entire work. After Walton & Co. had finished, about 2,500 square yards of the rock was taken out of the cut for the purpose of building footings for the bridge going over the cut. This was at a point on the cut near to the Min-

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ton house. Neither Walton & Co. nor Walton-McDowell Company had anything to do with that work, it being executed under a direct contract with a man by the name of Stepp. This work was done some months ago, after Walton & Co. had finished. The rock was removed by blasting." The above and foregoing evidence offered by the defendants is all of the testimony that shows any connection of either of the defendants with the blasting near plaintiff's house, and which he insists injured it. There is no contradiction in the record of the testimony of these two witnesses of the defendants.

When Walton & Co. blasted out the cut that passed in about a block and a half in front of the Minton property, no witness says except that plaintiff testifies that the blasting did injure his house and was done in the spring or summer of 1913. It distinctly and clearly appears that the Lewisburg & Northern Railroad Company let the work mentioned by the witness Barbee to the Walton-McDowell Company and that the latter company subcontracted it to Walton & Co. It does not appear when this work was completed, but it does distinctly appear that, after the contract by the Lewisburg & Northern Railroad Company and the McDowell Company had been executed and completed by the Walton Company, the N., C. & St. L. Railroad then had some work done and made a separate and independent contract with Walton & Co. to do that work for it. The connection between these two railroads, if there is any, is nowhere shown in the record. Nor is there any proof to indicate why the Nashville Railroad was having blasting done in that section or near plaintiff's house. The warrant states that it was in the construction of a branch of the N., C. & St. L. Railroad when it did the blasting that caused the injury to plaintiff's house. The proof fails to show whether the Nashville

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road was building a branch road, or a main line, or a side-track, or for what purpose it was doing such blasting. The one fact that does appear uncontradicted is that the blasting done for the Lewisburg & Northern Railroad Company by Walton & Co., and the blasting done for the N., C. & St. L. Railroad Company by Walton & Co., was not done at one and the same time, and it does not appear that these two companies were acting in concert or had a joint object or purpose in view or that they were trying to accomplish the same ends for the benefit of both roads. The witness does not say how long after the blasting for the L. & N. Railroad was completed it was before the blasting for the Nashville road was begun. There might have been, for aught that appears in this record, an interval of one year, or six months, or perhaps it may be not so long. The record is absolutely silent as to what space of time elapsed between the time when the first work was completed and the last work begun. It is clear that these two contracts were not being executed and carried out at the same time.

In *Swain v. Tennessee Copper Co.*, 111 Tenn., 435, the Supreme Court of this State, speaking through Mr. Justice Shields and in treating of the liability of joint tort feors to joint suit and judgment, said: "The test of joint liability is whether each of the parties is liable for the entire injury done. If they are joint tort feors each one is responsible for the damages resulting from the acts of all the wrongdoers, and they may all be sued severally or jointly; but if they are not joint tort feors each is liable only for the injury contributed by him and can only be sued in a separate action therefor." On page 438 of the same case the learned judge states the rule governing the liability of joint tort feors, and says: "When a tort is committed by two or more persons jointly, by force di-

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rectly applied, or in the pursuit of a common purpose or design, or by concert, or in the advancement of a common interest, or as the result and effect of joint concurrent negligence, there is no doubt but that all the tort feasons are jointly and severally liable for all the damages done the injured party, and that these damages may be recovered in joint or several actions, although the wrongful conduct or negligence of some may have contributed less than that of others to the injury done." On page 439 the learned judge says: "Where the tort feasons have no unity of interest, common design, or purpose or concert of action, there is no intent that the combined acts of all shall culminate in the injury resulting therefrom, and it is just that each should be held liable so far as his acts contributed to the injury. In such cases the injured party must proceed in separate actions against the several wrongdoers for the proportion of the damages caused by them respectively. This is the only reasonable and just rule that can be applied."

Applying the rules stated by the learned judge in *Swain v. Copper Co.*, *supra*, we find there is a total absence of any proof in this record that remotely indicates any common purpose or design on the part of these defendants in doing the blasting complained of; nor is there any proof to indicate a concert of action on their part or any two of them, and no evidence whatever to show that this work was done by these defendants in the advancement of their common interest or the common interest of any two of them. The record wholly fails to show that the injury complained of was the result and effect of the joint, concurrent negligence of two or more of these defendants. This being an action instituted against four defendants to recover for their joint or concurrent tortious acts, in pursuit of a common purpose or design or to advance their

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common interest, there must be some proof found in the record to make out a case of joint tort feasons against all of them, or two or more of them at least. As stated by the learned justice, if they are not joint tort feasons, and the proof in this case fails to show that they are, "Each is liable only for the injury contributed by him and can only be sued in a separate action therefor." In this case the plaintiff utterly failed to show that either defendants committed the tortious act resulting in an injury to his premises, and when the defendants placed their witnesses on the stand, while they proved some blasting in the neighborhood of plaintiff's house, they clearly established the fact that those who did it were not jointly interested in or jointly concerned in such blasting. The Lewisburg & Northern Railroad Company had blasting done at one time, and after it had completed its work, and some time thereafter, the N. & C. Railroad Company had blasting done in the same neighborhood, and for what purpose the record is silent. Before plaintiff can maintain a joint action against these defendants as joint tort feasons he must prove by preponderance of all the evidence his right to maintain such action and his right to recover a verdict and judgment against them as joint tort feasons, and this he has failed to do.

This brings us to a consideration of the verdict returned by the jury in favor of the plaintiff for \$500.00. The jury failed to find the defendants guilty of the joint tortious act which resulted in an injury to plaintiff's property, and yet notwithstanding such failure the trial judge proceeded to enter up judgment against all of the defendants, naming each of them, as joint tort feasons when the evidence wholly failed to establish that relationship between them. It may be true, and we think it probable, that the jury did not intend to find all of the defendants guilty of joint tortious

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acts resulting in injury to plaintiff's premises, and if such had been their verdict it seems manifest they would have so stated therein. The first assignment must be sustained.

Under the second assignment it is insisted the Court was in error in permitting the witness Mason to testify over the objections of defendants as to the amount of his bill for work and repairs done on the doors and windows of plaintiff's house. It seems that Mr. Mason did a little work on this part of plaintiff's building, but was unable to remember what his charges for such work were, when the Court rather urged him to state his recollection of it. Being thus urged, he put it at \$25.00. We would not be inclined to reverse the case for this error, but it is apparent that the little work done by Mr. Mason to repair the injury caused by the blasting was not worth \$25.00, and that he did not intend to so fix it. He had done other work on the house about the same time he made these repairs and we think he intended to state his recollection of his whole charge for the entire work. The work done by Mason on the doors and windows of the house had a value to it and was susceptible of proof. The witness should be able to tell exactly what work he did in the way of repairing the damaged part of the building and then to say what in his judgment or opinion such work was reasonably worth. It was not necessary that he produce his bill of charges for the work, or confine his testimony strictly to the amount he had charged; but, after stating fully what work he had done in repairing the injury caused by the blasting, it was then competent for him to testify what such work was reasonably worth.

It is insisted by learned counsel for appellants that the true rule by which to measure plaintiff's damages to his house is the difference in the usable or rental value of the property before and after the injury, it being insisted that

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this was a temporary injury. If the injury had been a permanent one it is insisted the measure of damages would then be the difference between the market value of the property before and after the injury.

In the case of *Walton-McDowell Co. v. Jackson*, 5 Higgins, this Court held, and its holding was approved by the Supreme Court, that it was competent to prove the reasonable cost of making the repairs to property injured by blasting, and a large number of cases cited in support of the holding, among them *Madison v. Copper Co.*, 113 Tenn., 331; *Terminal Co. v. Lellyott*, 114 Tenn., 368, and other cases not necessary to mention. While the rental value of property injured as plaintiff claims his was in this case, may not be diminished and it may be hard to show that such value was lessened by such an injury, yet all of us know that, when wall paper is broken and cracked to the extent mentioned by plaintiff, and the plastering on the house is injured as the proof in this case shows it was in this house, it costs something to repair it and put it in as good condition as it was at the time the injury was inflicted upon it. The tortfeasor is not expected or required to pay an amount sufficient to put the property in as good condition as it was when first built, but it is his duty to furnish the injured person with that amount of money which is required to restore the property to as good condition as it was at the time of the injury. We know of no better rule or way of determining the compensation that should be paid to injured parties in such a case than to require the person committing the tort to pay a reasonable sum for repairing the parts which he has injured and putting the property in as good condition as it was at the time of the injury. We think there was no error in the evidence objected to by defendants below.

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It is insisted that the Court was in error in permitting the witness Caroline Minton, plaintiff's daughter, to testify, over defendants' objections, that the blasting caused the plaster on the wall to crack and break. Counsel for appellants insist this was the very issue that the jury were sworn to settle by their verdict, and it seems to us that this insistence is well made. It was an issue in the lower Court, notwithstanding appellee's learned counsel insists there was none, as to what caused the plastering to crack and break. Some of the defendants' witnesses testified that plaster and papering in all houses will break and crack after it is placed thereon. This is caused by the house settling, or by its being shaken by the winds, or from expansion from heat or cold, and it is insisted that the older the house gets the more the papering and plaster breaks. Everyone who has lived in a house plastered or papered knows this to be true. It would be difficult to find a house as old as this one, it being ten years old, in which there were no cracks or breaks in the pastering and papering. Notwithstanding what learned counsel for appellee insists, we think the issue before the jury was whether the cracks and breaks in the papering and plaster of this house was caused by the blasting or was caused by the means stated by defendants' witnesses, and that this was the real issue between them and one of the issues to be determined and decided by the jury.

In *Bruce v. Beall*, 99 Tenn., 303, Mr. Justice Beard said, in speaking of a similar question: "We think it clear that in no case can the witness be allowed to give an opinion upon the very issue involved. To permit this would be to substitute the opinion of the expert for that of the jury whose duty it is to find the facts."

It is true in the later case of *Camp v. Ristine*, 101 Tenn., 534, Judge Beard modified the above statement

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to some extent and admitted exceptions to this general rule. In those cases the learned judge was dealing with the expert opinion of witnesses, while in this case the objectionable evidence goes to the very fact itself, in that the witness undertakes to say what caused the cracks in the paper and in the plaster and tells the jury that it was caused by the blasting.

In the case of *Telegraph Co. v. Mill Co.*, 129 Tenn., 381, Mr. Justice Williams, speaking for the Court, said in regard to the question now under consideration: "It may be said that where the question of the existing condition or injury is disputed, and where the jury must determine which of the causes urged by the respective parties is the right one, an expert's opinion may be admitted to the effect that a certain cause could or might produce the condition; but to permit him to testify as to what in his opinion probably did it would be to supplant the jury by the witness."

Miss Minton was not called on as an expert witness or asked to give an expert opinion, but was requested to state bluntly what caused the injury to the house, and in reply to the question she as bluntly and plainly stated that the blasting caused it, and this was one of the issues involved in the lawsuit. It is true her father, in his testimony, had said that "the cut was about a block and a half distant from his house, and the blasting cracked the paper and busted the plastering." This evidence on his part was equally as objectionable as that made by his daughter, and no doubt if the Court had sustained the objection to the testimony of Miss Minton, counsel would have asked that this statement made by the plaintiff be withdrawn from the jury. But as the trial judge had overruled defendants' objection to the testimony of Miss Minton, it was then useless to seek a withdrawal of her

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father's evidence. Non-experts may state the conditions that existed before and after the blasting was done, and it is then competent for the jury to say whether the injury was by the blasting in the neighborhood of the house.

Under the fifth assignment it is objected that the witness Rawn was asked certain questions in reference to other lawsuits that had been pending and tried in Court, and what witnesses had testified in such cases. This "witness was asked by counsel for plaintiff if it had not been shown in half a dozen cases that blasting had shattered houses out in Flat Rock and whether twenty witnesses had not testified that plastering had been blasted and shattered and broken." Objections were made to this question but overruled, and the witness required to answer. It is not shown what cases the question referred to or who were parties to them, or what connection the plaintiff or any of the defendants had to such lawsuits.

We think what the Supreme Court of Massachusetts said in the case of *Emerson v. Lowell Gas Light Co.*, 3 Allen, 410, is in point and fully sustains the defendants' objection to these questions. That Court said: "Each separate and individual case must stand upon, and be decided by, the evidence particularly applicable to it. The attending circumstances may be so different that the occurrence of sickness in one house would have no tendency to show the cause of illness of the occupants of another. If such evidence was admissible, the issue of a single cause might be individually multiplied; for this would tend only to confusion and mislead the jury. It is competent for the plaintiffs to show on the facts and circumstances attending their sickness and to add to that proof of the opinions of persons of skill and experience as to the cause which produced such sickness, and particularly whether it might have been, or probably was, produced

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by the gas to which they were exposed in their houses; but they were restricted by the rules of evidence to these limits and could not establish or strengthen the evidence in their own case, by any proof concerning the condition of, or the injuries received by another person.”

In this case it was immaterial whether houses owned by other persons were injured by blasting or not. Such houses might have been seriously damaged by such blasting, while plaintiff's residence remained uninjured, and to go into the injury to other houses in the same neighborhood, or to what was proved in trials involving such injuries, would open up a vast field of collateral issues that would throw no light on the questions involved in the pending litigation. We think it was incompeten to ask the witness these questions for any purpose whatever, and it was error in the trial judge to permit it to be done.

For the foregoing reasons the judgment of the lower Court is reversed and the cause remanded for a new trial.

Bank v. Hill.

MITCHELL COUNTY BANK v. J. J. HILL.

DRAWER OF CHECK. *Liability to innocent indorser for value.
Right to revoke payment denied.*

The right of the drawer of a check to revoke the same and forbid payment cannot be exercised after the check has been indorsed and transferred for value to an innocent holder.

FROM DAVIDSON COUNTY.

Appealed from the Chancery Court of Davidson County,
Part 2. JAMES B. NEWMAN, Chancellor.

JAMES S. PILCHER and LEMUEL R. CAMPBELL for Complainant.

PENDLETON & DEWITT for Defendant.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

THE only question for us to determine in this case is whether the drawer of a check can revoke the same to the prejudice of an innocent holder to whom it was indorsed for value before presentation for payment. We shall treat complainant in this case as such holder.

It will be noted that the indorsee is not trying to recover from the drawee bank, nor is he suing upon the check as it were. The suit is against a drawer upon an instrument of a negotiable character which has been dishonored.

We are aware of the well-known rule in this State that a check is not an assignment of any part of a general de-

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posit, and that the holder acquires no rights against the bank or against a particular fund. Nevertheless, a check is a negotiable instrument, governed with respect to parties by the law merchant and the negotiable instruments law. 5 Rul. ase Law, 530. And while the holder does not become vested with any peculiar right as against the drawee, he nevertheless has his remedy against the drawer. It is plain that this remedy is that of recovery of the amount and interest. See 5 Rul. Case Law, top of page 490; *Johnson v. Harrison*, 40 L. R. A. (N. S.), 1207. In the latter authority is to be found an equitable justification for a recovery of the kind here sought, even if not sustained by strict law merchant. It is there held that the drawer of a check virtually represents to any innocent holder thereof that it is a valid document. The only construction of the act of drawing a check and placing it in the hands of the payee is an authorization to assign it to any innocent person, with the implied obligation that it will be paid. It is therefore manifest that the allowance of the right to revoke a check thus drawn and delivered would be inequitable. And it is befitting that the doctrine of estoppel be used to take away this right to revoke to the prejudice of an innocent party.

The chancellor so held, and we affirm his decree with costs.

Process Co. v. Farr.

ALSO OF PROCESS COMPANY V. DAVID FARR.

Affirmed by the Supreme Court, 1917.

1. SALES OF PERSONALTY. *Sale of formula. The use of which is illegal.*

The owner of a formula for bleaching flour cannot recover for the sale thereof or the privilege of using same where it is shown that the use of the same was forbidden by a regulation of the National Food Department.

FROM WILLIAMSON COUNTY.

Appealed from the Chancery Court of Williamson County. DOUGLAS WIKLE, Chancellor.

CLARENCE T. BOYD for Complainant.

FAW & CROCKETT for Defendant.

MR. JUSTICE MOORE delivered the opinion of the Court.

THIS bill was filed to recover a decree on two notes, each for \$300.00, executed the 19th of September, 1908, one of them due twelve months after date and the other due in eighteen months thereafter. The defendant answered and filed a cross bill in which he plead a failure of consideration and sought to recover back \$200.00 cash he paid on the transaction at the time the notes were made. Later he filed an amended cross bill in which it was set up that the notes were given for a patent, or an interest in a patent, and that the fact that they were so given was not stated on the face of the notes, and it was charged that the

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notes were void for that reason, and could not be collected. The chancellor sustained the last defense and dismissed complainant's bill, but denied defendant recovery of the \$200.00 paid as part consideration in the transaction. Complainant has appealed to this Court and assigned errors to the decree of the chancellor.

It appears from the record that defendant was a flour mill man, the owner of a large flouring mill in Franklin, Tenn., and that complainant is the owner of a patented process for whitening and aging flour, and that on the 24th of July, 1908, complainant sold to defendant a license to use its process for aging and whitening fifty barrels of flour for twenty-four hours, and also an equipment of ample capacity therefor, and as a consideration for the sale and conveyance to him of such process and equipment, he agreed to pay complainant \$800.00, \$200.00 in cash and the remainder in two notes of \$300.00 each, and the notes sued on in this case are such notes.

This equipment and patent process was installed in defendant's mill about the 19th of September, 1908, and was used by him in such mill for aging and whitening flour until along in February, 1909, when he was notified by the Commissioner of Pure Food and Drugs of the State of Tennessee that the process contained deleterious and poisonous substances injurious to the health of persons using the flour, and he was warned not to use it any longer in the manufacture of his flour. He received this notice from the State Pure Food and Drug Inspector about the 1st of February, 1909.

It appears that the National Board of Food and Drug Inspections, in December, 1908, had this patent process before it for investigation and consideration, and this board was of the unanimous opinion that the process used for aging and whitening flour was and is an adulterated

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product under the Food and Drug Act of Congress, June 30, 1906, and that flour so treated by such process could not be legally made or sold, either in the District of Columbia or the territories of the United States or transported and sold in interstate commerce or in foreign countries. It appears that the National Board of Food and Drug Inspectors made a careful investigation of this process extending over a period of several months, and unanimously reached the conclusion that this bleaching and aging process resulted in an adulterated product under the Pure Food and Drug Act of Congress, and the sale of flour treated with this process was prohibited in the District of Columbia and the territories, and its transportation in interstate commerce and sale in such commerce was prohibited as well as its transportation and sale in foreign commerce. Immediately after this decision by the National Pure Food and Drug Department the State Inspector of Foods and Drugs in Tennessee reached the same conclusion in regard to this process, and also issued an order prohibiting the sale of flour treated by this process.

Defendant at once received notice of these decisions, and immediately informed complainant at St. Louis, Mo., that as it was not lawful for him to use the process, he declined to pay the notes sued on in this case, and demanded their return to him, which the complainant refused to do.

Under the case of *Cohn v. Lunn*, 133 Tenn., 547, we are of opinion that the defense set up in the amendatory answer, that the notes are void because it is not stated on their face that they were given for a patent or an interest in the patent, cannot be sustained, for the reason that under such decision we would be compelled to decide that these notes were executed in part payment of property covered by a patent, and not for an interest in the patent.

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The decree of the chancellor so holding, under *Cohn v. Lunn*, cannot be sustained; but we are of opinion that the chancellor's decree in dismissing complainant's bill must be sustained on the other ground, that is on the ground of the failure of consideration.

Defendant's mill burned after this equipment was installed in it. He had no insurance on the equipment, and collected none on it. Under the decisions of the Food and Drug Department at Washington, which has authority under the Act of Congress to investigate food and drugs and prohibit the sale of such as contain poisonous matter and are deleterious to the health of the consumer, it was unlawful for defendant to use this process in the manufacture of flour, and such use subjected him to prosecution under the Pure Food and Drug Act of Congress. Under the decision of the Pure Food and Drug Inspector it was also unlawful for defendant to use this process in whitening and aging flour, because it had been decided by those authorized to make the decision that it contained poisonous matter, and was deleterious to the health of consumers. These decisions, both of the National and State Departments, have never been set aside or annulled or reversed by any tribunal in any suit brought for that purpose, and must be regarded as *prima facie* correct and binding until revoked, set aside or annulled by competent judicial authority.

It follows then that the thing sold by complainant to defendant was something he could not lawfully use in his business, and the use of which subjected him to criminal prosecution, and for that reason we think the consideration for the notes executed and sued on in this case wholly fail.

The Pure Food and Drug Department of the United States at Washington brought suit to test the decision of the department to which reference has been made, and in

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the District Court it succeeded in sustaining its decision by a verdict of a jury. By appeal to the United States Court of Appeals the case was reversed and remanded because of error in the charge of the Court. On appeal to the Supreme Court of the United States the decision of the Circuit Court of Appeals was affirmed and the case remanded for a trial upon a correct charge, but has not been tried again so far as we are advised.

Inasmuch as under the rulings and decisions of the Pure Food and Drug Department at Washington it is unlawful to use this process in whitening and aging flour, or rather to sell flour to consumers that has undergone such process, we think that there has been a failure of consideration for the notes sued on in this case, and for that reason the decree of the lower Court dismissing complainant's bill must be affirmed.

The defendant did not appeal from the decree of the chancellor dismissing his cross bill, and so that branch of the case is not before us.

It results that the decree of the chancellor dismissing complainant's bill is in all respects affirmed with costs.

Black v. State.

WILEY P. BLACK V. STATE.

(Affirmed by the Supreme Court.)

1. NUISANCE. *Contempt. Notice of motion for attachment.*

There is nothing in the nuisance act nor in the rules governing contempt requiring the relator to give notice of his intention to apply for an attachment for contempt.

2. AFFIDAVIT AND ATTACHMENT. *Form of. Need not specify time or place.*

Neither in the affidavit for an attachment nor in the petition for nor the writ itself need the relator specify the time and place of sale asserted to be in violation of an injunction issued in a nuisance case. It is sufficient if these processes contain the averment or charge that the defendant has violated the injunction by illegally selling liquor in the county.

3. JUDGMENT OF CONTEMPT. *Entitled to greatest weight.*

The finding of the lower court that a party is guilty of contempt is in the appellate court entitled to the greatest weight.

FROM KNOX COUNTY.

Appealed from the Circuit Court of Knox County.
VON A. HUFFAKER, Judge.

WILLIAM REAVIS for Appellant.

ATTORNEY GENERAL MYNATT for the State.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

PLAINTIFF IN ERROR BLACK was one of the defendants to a bill filed in the Circuit Court of Knox County under

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the nuisance act, on May 4, 1914. He was charged with maintaining and conducting a place for the sale of liquor in the City of Knoxville, and was charged with being engaged in the unlawful traffic. A permanent injunction was awarded against him by the Circuit Judge on the 29th day of May succeeding. In this injunction he was forbidden to conduct the particular place described in the bill as a liquor saloon and was also enjoined from illegally selling liquor in Knox County.

On the 3rd day of October, 1914, the Attorney General petitioned the Circuit Judge for an attachment to issue against Black to show cause why he should not be dealt with for contempt in disregarding and violating the permanent injunction restraining him from illegally selling liquor in Knox County. The writ of attachment was issued and was served. In the petition constituting the application for the attachment the Attorney General charged that Black had violated the injunction by selling liquors in Knox County contrary to law. He did not name the date nor the place of the sale.

Upon the return of the attachment the defendant there-to appeared in person and by attorney and moved the Court to quash the proceedings because the application for the attachment and the attachment itself were void because the time, place and circumstances of the violation of the injunction were not set out. They also moved the Court to require the Attorney General to amend the process by making the correction above pointed out. These motions were denied by the Court and the defendant was required to meet the charges by answer and proof. A number of witnesses were heard orally by the Court. Black was adjudged to have violated the permanent injunction by having sold liquors contrary thereto and was held in contempt. He was fined \$50.00 and taxed with the costs and

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sentenced to confinement in the Knox County workhouse for a period of six months. He has appealed and assigned several errors. They shall be divided into two classes and thus treated.

In the first group of assignments it is insisted that the lower Court was in error in not quashing the attachment and dismissing the petition or in failing to require the Attorney General to make amendments showing the time, place and circumstances of the alleged sales upon the part of Black. We are of the opinion that the learned judge was not in error in declining to dismiss the proceedings. In the first place, the petition and the attachment approximated the practice described in contempt proceedings in the Chancery Court: Gibson's Suits in Chancery, 874. It seems that a general charge that the enjoined party has done or omitted the forbidden act without specification of time and place is sufficient. Even if this were a criminal proceeding by indictment or presentment, the language used would be sufficient. The State is never required to allege the time and place of the illegal sale. It suffices to charge generally that the sale took place in the county in which the Court is seated. We do not think that a defendant in a contempt proceeding can require greater certainty than can the defendant to an indictment.

All assignments of error challenging the form and sufficiency of the pleadings and criticizing the Court for not requiring more particularity must be overruled.

This leaves for our consideration only the question as to whether or not this Court should review the facts and reverse the judgment of the lower Court in committing plaintiff in error. We are reminded that contempt proceedings are criminal in their nature, and that the party charged is entitled to the presumption of innocence, which carries with it the burden of the State to show his guilt

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beyond a reasonable doubt. But the requirements of criminal practice and criminal law must also be observed when a conviction for contempt is brought in review by an Appellate Court. In such case the attitude of the parties is quite different from that occupied in the lower tribunal. The burden is cast upon the appealing party to convince the higher Court that the evidence preponderates against the judgment and that the Court decided contrary to the greater weight of the testimony.

The judgment of the lower Court carries with it a presumption that cannot well be ignored. The credibility of the witnesses was peculiarly for him. He saw them, heard them, weighed them singly and in conjunction, and his opinion necessarily has the greatest weight.

We have carefully scrutinized this record and have reached the conclusion that the evidence does not preponderate in favor of the appellant. To say the least of it, the evidence might be treated as in *equivoise*. But in truth there are many incriminating circumstances not explained away by Black. Black is an old customer. The decree of the Circuit Judge pronounced preceding the injunction adjudged him guilty of maintaining an illegal liquor business, and it is but natural to assume that he would follow this old vocation when opportunity was offered.

Much is said about the absent Chattanooga witnesses. With respect to this matter it suffices to say that the postponement was largely in the discretion of the Court. Again, we do not see that this evidence would have changed the result. The Court is also criticized for sustaining the proceedings without notice of the application for the attachment having been given. There is no merit in this contention. The law makes no requirement that this be done.

City v. Wills.

We discover no reversible error in the judgment of the lower Court and affirm the same with costs and direct that the cause be remanded to the lower Court, to the end that the judgment of conviction and commitment be carried into execution.

CITY OF NASHVILLE v. J. E. WILLS AND WIFE.

Affirmed, except as to amount of damages, by the
Supreme Court, 1916.

1. MUNICIPAL CORPORATIONS. *Nuisance. Construction of sewers. Discharges from into stream.*

Municipal corporations are liable in damages for a nuisance created by it in discharging the contents of a sewer into a stream so as to pollute the water and befoul the atmosphere. It cannot claim immunity upon the ground of necessity or under the governmental function doctrine.

2. SAME. *Following natural drainage. No exception.*

Nor is a municipality to be exempted upon the ground that in constructing its sewers it followed the natural drainage of the territory. It suffices that accumulations were excessive and are unusual.

3. NUISANCE. *Damages. Joint tort feasons. Burden of proof as to proportions to be borne.*

Where wrongdoers are not joint tort feasons each is liable for its proportion only. But where injury is shown and that a defendant has contributed thereto the burden is on it to show that proportion which should be charged to others.

4. NUISANCE. *Estoppel of purchaser after creation.*

A purchaser of property in a neighborhood of the sphere in which a nuisance operates is not estopped by reason of his purchase to complain of the existence of the nuisance.

City v. Wills.

5. DAMAGES TO REALTY. *Measure of and elements of. Rental value.*

A landowner suing for damages for the maintenance of a nuisance cannot recover for mere discomfort and annoyance alone, but must make the diminished rental value of his property the basis of his recovery. But when diminution is shown he may prove annoyance and discomfort to further show depression of rental or usable value of his property.

FROM DAVIDSON COUNTY.

Appeal in error from Third Circuit Court of Davidson County. A. G. RUTHERFORD, Judge.

ALBERT G. EWING and F. M. GARARD for the City.

GARLAND MOORE and W. C. CHERRY for Defendants in Error.

MR. JUSTICE HALL delivered the opinion of the Court.

THIS is an appeal in error by the City of Nashville from a judgment rendered against it in favor of the defendants in error for \$750.00 damages, growing out of an alleged nuisance committed and maintained by the plaintiff in error.

The defendants in error's declaration avers in substance that they purchased a lot some six years ago situated in South Nashville, on Coleman Avenue, about 100 yards from Brown's Creek, and built a house thereon, which is now occupied by them and their six children; that the creek was not offensive at the time of their purchase, but that the city continued to construct its sewers, and to empty all manner of foul and offensive sewage into said creek from closets, dye works, canning factories, hospitals,

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etc., which polluted the waters of said creek, which had heretofore been a pure and wholesome stream; that this sewage did not flow naturally into said creek, but that it was collected by the city from a large area in sewers and dumped in a concentrated form into the same; that the city has committed and is now committing a public and private nuisance injurious to the health by polluting the waters of said creek, a public stream, contrary to the statute, whereby foul and noxious odors or gases are carried to and across the premises of defendants in error into their dwelling, their stock water is polluted and cut off and waters for washing and family use is destroyed; the well on the premises is polluted and rendered unhealthy in time of high water; the spring from which the family uses water is also polluted; all of which is damaging to their property, dangerous and injurious to their health, and destructive of the comfort and happiness of their family, and the usable value of their property has been greatly impaired thereby.

The pleas of the plaintiff in error to said declaration raise, in substance, the following questions:

(1) That Brown's Creek has been used by it for more than twenty years next preceding the bringing of this suit as a place for emptying, through its sewers which terminate in said creek, its sewage collected from that portion of the city near which said creek is located.

(2) That it is not guilty of the alleged nuisance because Brown's Creek has been used for more than seven years as a place of drainage, into which it has emptied its sewage by means of enclosed sewers.

(3) That defendants in error's suit was barred by the statute of limitation of three years.

(4) A plea of not guilty.

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To the plea filed by plaintiff in error, averring a prescriptive right to drain its sewage into Brown's Creek, defendants in error filed a replication, which denied that plaintiff in error has used Brown's Creek openly and adversely to defendants in error's rights, for the purpose stated in said plea, continuously and for more than twenty years, as averred in its said plea.

In addition to this denial, said replication averred in substance that when plaintiff in error built its first sewer, and emptied its sewage into said Brown's Creek it created a nuisance, but the waters of said creek were able to take care of said sewage at that time, so that it did not give off the offensive odors that it does at the present time; and did not result in the damage now caused by the draining by the city of its sewage into said creek; that the plaintiff in error has from time to time within the past twenty years and up to two and one-half years ago, continued to construct and maintain its sewers in the southern portion of the city, and to drain a much greater quantity of filthy and polluted sewage into said creek, thus greatly increasing the nuisance from time to time, which still continues, and will continue to increase as the population of South Nashville increases, and additional connections are made to said trunk and lateral sewers.

By the first assignment of error of the city it is insisted that the Court erred in overruling its demurrer to the defendants in error's declaration.

This assignment will not be considered, because it fails to set out the substance of the grounds of said demurrer or state wherein the Court erred, and how the plaintiff in error was prejudiced by the action of the Court in overruling the same, as required by the rules of this Court. Rule 14, sub-section 3, 126 Tenn., 722.

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By the second assignment of error it is insisted that the Court erred in not directing a verdict in favor of plaintiff in error, upon its motion made at the close of all the evidence.

It is insisted by the third assignment that the Court erred in overruling plaintiff in error's motion for a new trial.

This assignment is too general and will not be further noticed.

By the fourth assignment it is insisted that there is no evidence to support the verdict of the jury.

This and the second assignment raise substantially the same question, and will be considered together. The evidence shows that Brown's Creek is some eight or ten miles long and traverses the extreme southern corner of the City of Nashville; from its source to where it flows into the Cumberland River, and the territory in the vicinity of said creek on both sides is thickly populated. Defendants in error's property is located about 150 yards beyond the corporate limits of the City of Nashville, near the Lebanon turnpike, and about 125 yards from the bank of said creek. The evidence shows that the City of Nashville maintains six large sewers, about four feet in diameter, which empty into said creek above the defendants in error's premises. These sewers take care of the drainage from a large area in the southern portion of the city, to wit, about one thousand acres, and are connected with a large number of toilets and drain sewage from them, which empties into Brown's Creek. The first of these sewers (Mallory street sewer) was completed by the City in September, 1895. The Fairfield sewer was completed in 1904. The Sandy Bottom sewer was completed in 1905. The sewer in the alley was completed in 1911. The Wav-

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erly trunk sewer was completed in 1913. The Donelson street sewer was completed in 1913.

Defendants in error offer evidence tending to show that before these sewers were constructed, and before the sewage from them began to drain into said creek the water was pure and wholesome, but in the last few years it has become so very foul, on account of the sewage from the city's sewers being drained into it, that live stock will not drink it. The evidence further shows that said stream was formerly inhabited by fish, but in recent years the fish have all disappeared on account of the foul condition of said water. The evidence further tends to show that, owing to the offal emptied into said creek from said sewers, foul and noxious odors or gases are emitted from said creek, which odors or gases are so offensive that defendants in error and their family cannot sit on their porch at times, and in the summer and fall seasons frequently have to close the doors and windows of their dwelling in order to avoid said foul and noxious odors; that these foul and noxious odors can be smelled all the year round, but are worse at times than others. The evidence further tends to show that in the summer season the water in this creek gets very low, and that a large quantity of the sewage which is emptied into said creek is composed of human excrement, garbage from sinks, and all character of filthy substances, which, on account of the low condition of the stream, remain on the banks of said creek, and in its bed, for a considerable time, and from which foul and noxious odors or gases are emitted to the great discomfort of defendants in error and their family; that when said creek rises to a high stage of water in the winter time, it gets out of the banks, and said polluted water backs into the well of the defendants in error, which is located on their premises; that so great is the quantity of

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sewage emptied into said creek from the city's six large sewers it is impossible for the water in said creek, at its ordinary stage, to carry said sewage away, and when a freshet comes sufficient to wash the sewage away from the mouths of the sewers, the creek being very crooked, the sewage is washed in piles along the banks, and there is left to emit foul and noxious odors or gases, which, the witnesses for the defendants in error say, smell like that of a privy. According to the testimony of a number of witnesses introduced by the plaintiffs below this condition is almost intolerable, and defendants in error say that it has practically destroyed the usable value of their property. This, in substance, is the evidence offered by the plaintiffs below, and we think is some evidence tending to show that the city has committed a nuisance as alleged by defendants in error in their declaration.

Some evidence was offered by the city tending to show that Brown's Creek is polluted by offal draining into said creek from an oil refinery situated near its banks; but the weight of the evidence shows that the oil refinery did not begin to operate until September, 1915, ran only three days, and then burned down. This was after the damages sued for in this action had accrued. It is true the proof shows that said oil refinery had been rebuilt, but had not been in actual operation for more than six or seven weeks before the trial of this cause in the Court below in April, 1916.

The plaintiff in error also offered evidence tending to show that three large cemeteries were situated near Brown's Creek, the natural drainage of which was in the direction of this creek, and it was insisted that the drainage from said cemeteries, including the natural drainage from a number of factories, hospitals, and from the state fair grounds, emptied into said creek and polluted its

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waters; but we think the preponderance of the evidence is against this contention of plaintiff in error. We not only think there is evidence tending to show that the waters of said creek are polluted by the offal coming from the city's sewer, but we think the weight of the evidence established this fact.

It is insisted that the City of Nashville cannot be held liable in damages for constructing its said sewers in such a way as to empty into Brown's Creek, because said sewers were constructed along natural drainways, and were constructed for the benefit of the health of both the population inside and out of the city, the city having grown along said drainways, branches, etc., and that it has become necessary for the city to use said stream for drainage purposes, and, therefore, it had the right to construct its sewers along such natural drainways.

The evidence fails to show that before these sewers were constructed by the city that the natural drainage of the territory, which is drained by said sewers, even tended to produce the conditions that exist now in said creek. There is no evidence tending to show that the offal from the many hundreds of toilets that is now carried into said creek by the city's sewers passed into said creek before the sewers were constructed. On the contrary, the evidence tends to show that the toilets in that portion of the city were walled up with brick and cement, according to the regulations of the city and county health authorities, and had to be cleaned out and the offal hauled away.

By Section 6869 of Shannon's Code, it is a public nuisance:

(1) "To cause or suffer any offal, filth, or noisome substance to be collected or to remain in any place to the prejudice of others."

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(2) "To obstruct or impede, without legal authority, the passage of any navigable river or collection of water."

(3) "To corrupt or render unwholesome or impure the water of any river, stream or pond, to the injury or prejudice of others."

It has been repeatedly held that a municipality, in pursuing a public work, is not privileged to commit a nuisance to the special injury of a citizen, and if it does, it must, as a private individual, respond in damages therefor: *Chattanooga v. Dowling*, 101 Tenn., 342; *Burtram v. Chattanooga*, 7 Lea, 739; *Chapman v. Bochester*, 110 N. Y., 273; *Hines v. Rocky Mount*, 162 N. C., 409, 33 Ann. Cas., 132; Am. Ency. of Law, Vol. 21, 717; *Thompson v. City of Winona*, 96 Miss., 591; *Smith v. Sedalia*, 152 Mo., 283.

It is next insisted by the city that it acquired a prescriptive right to pollute the waters of said creek by reason of its long and continued use of said creek for that purpose and for more than twenty years next before the bringing of this suit.

The evidence shows that this suit was brought in August, 1915, and that the first sewer constructed by the city was built in September, 1895, which was less than twenty years next preceding the bringing of this suit by the defendants in error. It cannot therefore be held that plaintiff in error has acquired any prescriptive right to pollute the waters of said stream. Furthermore, the evidence tends to show that only for the last few years has the volume of offal from said sewers been so great as to create a nuisance injurious to defendants in error's property.

It is next insisted that the action of defendants in error is barred by the statute of limitations of seven years.

We hold this contention not well taken. The seven-year statute is not applicable to said cause of action.

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It is next insisted that there can be no recovery in this cause because defendants in error's lot does not abut directly on said creek, but is 125 yards distant from it.

We think this is immaterial, in view of the evidence. The proof shows that it is close enough to be affected by the nuisance.

Mr. McQuillan, in his work on Municipal Corporations, announces the rule thus:

"It is not necessary that the sewage be deposited directly on one's property to authorize a recovery of damages, but it is sufficient that it percolates into and through the land."

In *Rhodes v. City of Durham, N. C.*, 81 S. E., 938, it was held that where plaintiff's property extended to within fifty yards of a stream, and was injured by a discharge of sewage into the stream by the defendant city, the fact that the property did not abut on the stream, and that there had been no physical invasion of plaintiff's rights in the same, would not prevent plaintiff from recovering permanent damages resulting to his land from the nuisance.

It is insisted that the Court erred in giving the following instruction to the jury:

"The defendant city further claims that if any such nuisance does exist to the extent of causing plaintiffs private or special damage that it was not caused by the defendant, but that other causes such as a number of cemeteries, dairies, private closets, the State Industrial School, and an oil refiner all dumping their foul contents into said Brown's Creek together with dead cats, dead dogs, chickens, etc., have contributed to produce the situation complained of, if such exists, and that the amount of sewage drained

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into said creek through the defendant's sewers was not sufficient of itself to pollute the waters of Brown's Creek in such manner as to render the same a nuisance, and that no such nuisance ever did exist in said creek, if at all until the other agencies above named added their foul contents to the waters of Brown's Creek. The defendant insists that it is not liable in any amount of damages whatever, and that in no event can it be held liable for more than its proportionate part of the whole damage done, if any, based upon the proportion that its said sewerage bears to the whole amount of foul and unwholesome garbage that has been thrown into said creek within three years next preceding the bringing of this action.

The Court instructs you, gentlemen of the jury, that the above contention of the defendant city raised by its first, second and fourth pleas as above read to you is a legally sound and valid contention, but that the burden of the proof rests upon the defendant to show by a preponderance of all the evidence in the case that the statements raised by and embraced in its first, second and fourth pleas as above set out are true before defendant can escape liability on its said first or second or fourth plea."

We are of opinion that there was no error in this instruction. The city having set up by its pleas that outside agencies, not connected with its sewers, had contributed to the creation of the nuisance which had affected the property of defendants in error, we think the burden of proof was on the city to show what proportion of the damage, which defendants in error had sustained, was produced by said outside agencies. Said pleas were affirmative in their nature, and the burden of proof is always on the party having the affirmative of the issue: *Stewart v. Nashville*, 96 Tenn., 50; *Insurance Co. v. Bennett*, 90 Tenn., 256.

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It is next insisted that the Court erred in giving in charge to the jury special request No. 4 of the defendants in error, which is as follows:

“The Court further charges you that if one purchases land near a creek, and at the time he purchases he knew of the existence in the creek of a nuisance, consisting of the discharge of sewage therein from a neighboring city under an alleged easement, the plaintiff would not be estopped to recover damages against the city for a nuisance.”

We are of the opinion that there was no error in this instruction. In the first place there was no evidence tending to show that defendants in error knew of the existence of the alleged nuisance at the time they purchased the property in question. Upon the other hand, Mr. Wills expressly testified that he did not know of the existence of said nuisance, and the evidence tends to show that said nuisance did not really exist at the time of the purchase by defendants in error, but has been created since by the construction of additional sewers, which empty into said creek, and by which the drainage of offal into said creek has been greatly increased. However, if defendants in error had known of the existence of said nuisance at the time they purchased the property in question, we do not think they would be estopped from claiming damages sustained by reason of said nuisance, because a nuisance is unlawful, and one is not bound to contemplate that it will be continued by the person creating it, but rather that it will be discontinued.

By the fifth assignment of error it is insisted that the verdict is excessive; so much so as to indicate passion, prejudice, or caprice on the part of the jury.

By the sixth assignment it is insisted that the Court erred in charging the jury as follows:

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“The damage to the rental value of plaintiffs’ premises should largely govern you in the assessment of damages, but if certain and positive damage has been shown to the rental value of plaintiff’s said property, then you may also take into consideration such discomfort and annoyance and danger to health that plaintiffs were subjected to by reason of the presence of such nuisance, and allow the plaintiffs such damages as will fairly compensate them for the said decreased rental value or use of their property, together with and for such discomfort, annoyance, and damage to health as they have sustained.”

We are of opinion that the above instruction was erroneous, and was not in accord with the rule announced in the cases of *Gossett v. Sou. Ry.*, 115 Tenn., 390, and *Terminal Co. v. Lelleyett*, 114 Tenn., 407. The rule announced in those two cases, if we understand it correctly is, that recovery can be had only for the impairment of the usable or rental value of the property growing out of the discomfort and inconvenience suffered from the alleged nuisance; that there can be no recovery for mere discomfort, annoyance or mental distress occasioned by the nuisance, unless such discomfort, annoyance, etc., proceeds to the extent of injuring the usable or rental value of the premises. There is no evidence in the record tending to show that defendants suffered any physical injury from said nuisance, nor that their healths were impaired. There is testimony showing that two years before the trial the son of defendants in error had a spell of fever, but there is no evidence tending to show that this attack of fever was due to the nuisance then being created by the city. The most that is proven is that defendants in error and their family suffered discomfort, annoyance, and inconvenience from the foul odors carried by the winds on and into their premises. We think their recovery must be con-

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fined to injury to the usable or rental value of their property, and there can be no additional recovery for mere physical discomfort, annoyance and inconvenience suffered by the defendants in error.

The evidence shows that the property of defendants in error was worth from \$800.00 to \$1,000.00, and that its rental value would be \$12.00 or \$12.50 per month but for the existence of said nuisance. Defendants in error introduced evidence tending to show that the usable value of their property had been destroyed by the alleged nuisance.

The Court charged the jury that defendants in error could only recover for damages sustained within three years next preceding the bringing of the suit, and it is quite evident that the jury included in their verdict damages not only for injury to the usable value of said property, but said verdict embraces damages for physical discomfort, inconvenience and annoyance suffered by defendants in error on account of said nuisance. Assuming that the rental or usable value of defendants in error's property was entirely destroyed for three years next preceding the institution of their suit, this would amount only to \$450.00. The verdict of the jury was for \$750.00, and we think it excessive. The excessiveness is, no doubt, due to the error in the Court's charge relating to the elements of damage, which the defendants in error were entitled to recover. We think this error may be cured, however, by a remittitur.

It is therefore ordered that unless defendants in error will accept a remittitur of the sum of \$300.00, the judgment will be reversed, and the cause remanded for a new trial. If the remittitur is accepted, the judgment, less said remittitur, will be affirmed with costs.

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MARY SMITH v. EWIN MEDLEY ET AL.

Writ of certiorari denied by the Supreme Court, 1916.

1. **CHANCERY PLEADING AND PRACTICE.** *Inconsistency of original and amended bills. Matters of law and matters of fact.*

The rule forbidding the filing of an amended bill inconsistent with the averments of an original bill has no application to the case of an amended bill setting up differing claims upon matters of law.

2. **ESTOPPEL.** *Judicial estoppel. Construction of instruments.*

The doctrine of estoppel does not repel a litigant who takes a different position with respect to construction of an instrument from that one occupied by him at the beginning of the lawsuit. Nor is a party to an instrument estopped to assert that his first construction of an instrument was erroneous.

3. **DEEDS.** *Construction of. Intention of testator. Disregard of technical divisions.*

It is the duty of the courts to ascertain the intention of the maker of a deed and to give effect thereto regardless of the technical parts of the instrument.

4. **SAME.** *Grantee named for the first time in the habendum clause.*

A party named for the first time in the habendum clause of a deed may be treated as a vendee if it be clear that the grantor intended the party to be one of the conveyees.

FROM PUTNAM COUNTY.

Appealed from the Chancery Court of Putnam County.
A. H. ROBERTS, Chancellor.

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O. K. HOLLADAY for Appellants.

B. G. ADCOCK and V. E. BOCKMAN for Appellee.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

COMPLAINANT filed her first or original bill in October, 1915, alleging that she was the widow of one N. B. Medley, deceased, and that the defendants were her children and grandchildren; that her husband died in 1910 the owner of a tract of land in Putnam County containing about eighty acres; that she was the owner by purchase of a one-tenth undivided interest acquired from her son Doc Medley, and that she was entitled to homestead and dower, although the same had not been allotted to her; and that the land was worth about \$3,000. She further declared her desire that the land be sold, and that the cash value of her homestead and dower be ascertained and paid to her, and that the remainder interest be converted and divided.

The adult defendants resisted the sale of the homestead, claiming that the minors were themselves entitled to homestead, and should be kept together until all arrived at age. The minors answered through guardian *ad litem*, who submitted their interests to the protection of the Court. Complainant demanded a jury for some reason, and the case was set for trial on December 9th.

On December 8th complainant presented an amended bill in which, after repeating the substance of the original bill, she averred that she had been laboring under a mistake as to her interest in the tract of land involved, in that she was as a matter of law and fact the owner of the entire estate; that she had more closely examined the deed of her husband, and had been more recently advised with respect thereto, and had been told that the land was originally con-

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veyed to her husband and herself as tenants by the entireties, and that as she had survived her husband, she was sole owner.

Her prayer was that her amended bill be filed, that defendants answer, that the Court construe her deed and decree her to be the owner of the land involved instead of a tenant by dower and homestead.

The chancellor permitted the amendment to be filed, with permission of course to defendants to defend. They demurred upon the ground that the amended bill was inconsistent with the original bill, and secondly because, when the deed in question was construed as part of the amended bill, as it should be, it was shown that N. B. Medley was the absolute owner of the land. The deed in question was executed by Gallant Tucker and wife in 1903.

The case was determined by the chancellor on demurrer. He construed the deed as having been made jointly to complainant and her husband, with survivorship in her; and he sustained the amended bill and adjudged her entitled to the land, and not estopped by any step taken by her theretofore. From this decree all defendants, including the minors represented by guardian *ad litem*, have appealed and assigned errors.

We shall dispose of some two or three questions of procedure before discussing the much controverted legal point. It is earnestly contended by able counsel that the amended bill should have been disallowed, because it was contradictory of the first bill, and because it was equivalent to an abandonment of the claims of the first pleading and the substitution of a new claim or equity.

There is no doubt but there is a conflict between the original and the amended bills. In the first complainant

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claimed as widow of N. B. Medley and asserted no other interest than as such widow and vendee of an undivided interest of a child. In her second bill she avers absolute ownership. If these were matters of fact solely, complainant would have no standing. Equity refuses to hear a party who resorts to contradictory allegation. But the rule has no application to contentions with respect to matters of law. It is not contended that any of the defendants were misled to their prejudice by the position of complainant; and it is apparent that the knowledge of each was equal. The deed in question was registered some years before this litigation arose, and was subject to inspection. Hence the absence of the two essentials of an estoppel. For it is necessary before an estoppel is wrought to show that the party urging the defense had been misled. This cannot be done with respect to legal questions, especially those about which there is controversy, and particularly is this so with respect to the construction of instruments. *Tate v. Tate*, 126 Tenn., 169. We therefore overrule all those assignments assailing the action of the chancellor and permitting complainant to file her amended bill.

Recurring now to the chief assignment, namely, that the chancellor was in error in adjudging that complainant became the absolute owner of the land at the time of her husband's death; we shall briefly state the two contentions. It is urged by appellants that as Mrs. Medley's name was not mentioned in the granting clause or anywhere else than in the habendum, she was not a conveyee. It is urged by complainant, that although her name did not occur in the conveying clause, it was inserted in the habendum, and that this clearly indicated an intention to vest her with title jointly with her husband.

The deed involved is in substance as follows:

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"We, Gallant Tucker and wife, Eliza Tucker, have this day bargained and sold to N. B. Medley for the consideration of \$900 . . . the following described tract of land . . .

"To have and to hold to the said N. B. Medley and wife M. J. Medley and their heirs and assigns forever. We do covenant with the said N. B. Medley that we are lawfully seized of said land and have a good right to convey it, and that the same is unincumbered. We further bind ourselves, our heirs and representatives to forever warrant and defend the title of said land to N. B. Medley and his heirs against the lawful claims of all persons."

Our primary duty is to ascertain the intention of the parties to this instrument. The common law rules whereby deeds were divided into premises, habendum, and covenant clauses have been so far modified as to require the Courts to disregard these technical parts in their efforts to ascertain the intention of the grantor. *Fogarty v. Stack*, 86 Tenn., 610; *Teague v. Sowder*, 121 Tenn., 163, 8 Rul. Cas. Law, 1037; *Carl-Lee v. Ellsberry*, 12 L. R. A. (N. S.), 956.

What is meant by disregarding the technical division of a deed in the effort to learn the intention of the grantor with respect to the grantee? It is none other than that if a Court can see that the grantor intended for a certain party to be a grantee, effect must be given to this intention regardless of the place in the deed at which the name of the grantee appears.

It is true that a granting or conveying clause of a deed is always important, and that it in general contains the names of all grantors and grantees. But this does not render it illegal nor impossible to insert the name of a grantee at another place. While it is also the general rule that we find the quantum of estate and the purchasers all

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named in the premises or granting clause, and that subsequent clauses inconsistent therewith are to be disregarded, this still does not abate one tittle the obligation of the Court to find the intention of the testator and to give it effect if not contrary to law. It is only when the two clauses are irreconcilable to such an extent as to bring confusion and to render impossible the carrying out of the two that the rule whereby the last clause must give way applies. *Teague v. Sowder, supra*.

We are of opinion that the above deed manifests an intention of the grantor that the wife of Medley should be a joint grantee of the estate. It will be observed that she is not merely referred to as wife, but that her initials are given; and it should also be noted that the heirs of the husband and wife are referred to jointly. It is true that the covenants are with Medley only. But there still remain words which clearly indicate that Mrs. Medley was to be interested in the estate as an occupant or participant, and terms pointing out an estate in fee in her are to be found. If we were to apply the old common law rule with its strictness, Mrs. Medley might be excluded. Even this is a matter of controversy as we shall attempt briefly to show later. But we are at present concerned to know how the explicit provisions of the habendum clause can be treated as of no validity. The presumption must be indulged that these terms were used advisedly and for a purpose; and they must not be lightly cast out or stricken from the context. *Coal Co. v. Beckelheimer*, 52 Am. Rep., 645.

Even at the common law it was held that the Courts should give effect to both the granting clause and the habendum clause when reconciliation was possible. *Hustedd v. Rollins*, 42 L. R. A. (N. S.), 383. It can readily be imagined that the draftsman of this instrument thought

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the insertion of Mrs. Medley's name in the habendum sufficient. At that time much more than at present the husband was the director in such matters; and it is not far-fetched to assume that the grantor and Medley deemed a conveyance to him, with specification that he was to hold it jointly with his wife, sufficient to vest her with an interest.

We need not consider the very numerous authorities announcing the rule requiring the elimination of the second or conflicting clause of a deed. Most of them deal with the quantum of estate. Very few treat of the enlargement of the number of grantees. With respect to the latter we found in our investigation that it has been treated by the Courts in a few instances, always favorably to the contention of the omitted grantee. For instance, it was held in the South Carolina case of *McLeod v. Tallant*, 20 L. R. A., 842, that the insertion of the name of the wife in the habendum clause only was sufficient to make her a joint grantee with her husband. In *Husted v. Rollins, supra*, it was held that a new or additional vendee might be brought in by the habendum; and it seems to have been held at numerous times that the grantee might be named for the first time in the habendum. *Berry v. Billings*, 69 Am. Dec., 107; 4 Kent's Com., 468. In fact the habendum clause was at the common law regarded as the proper place in which to insert the name of the vendee. If so, why could an additional name not be inserted? And this really is justified by every rule other than those of the most technical kind.

In Devlin on Deeds, Sec. 215, it is stated that where it is clear that the grantor intended that the habendum clause should prevail, it will be given effect. Complainant brings herself within this rule. For there can be no mistaking the intention of the grantor that Mrs. Medley participate.

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See also *Bocline v. Arthus*, 34 Am. St., 162, wherein it was held that where a grantor manifested an intention with respect to the thing granted, this intention must be effectuated, although it appear at an unusual place in the instrument. We are satisfied with the correctness of the decree of the chancellor in treating Mrs. Smith as tenant by the entirety with her husband, and therefore entitled to the estate by survivorship.

It results that the decrees will be affirmed and the cause remanded to the lower Court for such additional steps as may be necessary. We direct that Mrs. Smith pay the costs of this proceeding, her conduct clearly justifying such an order.

Collier v. Studios.

BARRON G. COLLIER INC. v. GEORGE STUDIOS.

Affirmed by the Supreme Court, 1917.

FOREIGN CORPORATIONS. *Failure to prove the filing of a charter with the secretary of state. Presumption with respect to.*

In the absence of proof to the contrary the presumption will be indulged that a foreign corporation suing in this state has complied with the statutory requirement that the charter of such corporation be filed with the secretary of state as a condition precedent to the doing of business in this state.

FROM KNOX COUNTY.

Appealed in error from the Circuit Court of Knox County. VON A. HUFFAKER, Judge.

ROY JOHNSON for Plaintiff in Error.

CATES & PRICE for Defendant in Error.

MR. JUSTICE HALL delivered the opinion of the Court.

THIS is a suit upon an account for \$173.98, and was instituted on November 3, 1915, before a justice of the peace for Knox County, by the plaintiff in error, Barron G. Collier, Inc., against the defendant in error, George McClain, proprietor of George Studios.

The account upon which the suit was brought came from the State of New York, and was sworn to as required by statute. The affidavit showed that the plaintiff in error was a New York corporation.

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The case was finally carried to the Circuit Court of the county, where it was tried before the circuit judge without the intervention of a jury, and a judgment was rendered in favor of the plaintiff in error and against the defendant in error for the amount of said account, and costs of suit.

Subsequently, a motion for a new trial was seasonably filed by the defendant below, seeking to have the judgment vacated and set aside upon the ground that it appeared from the undisputed evidence introduced upon the trial that the plaintiff below, Barron G. Collier, Inc., is a corporation duly chartered and organized under the laws of the State of New York; that the account sued on was predicated upon a contract entered into between the plaintiff and defendant, under the terms of which the plaintiff contracted to and did furnish advertising cards in one-half of all the street cars of the Knoxville Railway & Light Company, operated on the tracks of the Knoxville Railway & Light Company in Knoxville, Tennessee; and that said advertisements were inserted in said cars between the dates of April 30, 1913, and August 1, 1914; that said plaintiff had an auditor in Knoxville, who checked said cards in said cars; that the plaintiff was doing business in the State of Tennessee, within the meaning of chapter 122 of the Act of 1891, and chapter 31 of the Act of 1877, which Acts, by their terms and provisions, prohibit foreign corporations from doing business in Tennessee, unless such corporations shall first file in the office of the Secretary of State copies of their charters, and cause abstracts of the same to be recorded in the office of the Register in each county in which said corporation desire or propose to carry on their business, and which Acts provide that it shall be unlawful for any such corporation to do, or attempt to do any business in this State, without having

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complied with the provisions of said Acts. And that the plaintiff failed to prove, upon the trial of said case, that it had complied with said statutes, and, therefore, could not enforce its claim against the defendant McClain.

This motion was sustained by the trial judge, and the judgment in favor of the plaintiff in error was vacated and set aside, and its suit dismissed. From this judgment it appealed to this Court, after its motion for a new trial had been overruled, and it has assigned the action of the Circuit Judge in vacating and setting aside the judgment in its favor upon the grounds stated in the defendant in error's motion for error.

The affidavit attached to the account sued on, and which account was attached to the warrant, showed that the plaintiff in error is a foreign corporation, but there was no evidence offered in the Court below tending to show that the plaintiff in error had not complied with chapter 122 of the Act of 1891, which requires all foreign corporations, before attempting to do business in this State, to file a copy of their charter in the office of the Secretary of State. The record is silent on this point.

It is manifest that the trial judge, in vacating and setting the judgment aside upon the defendant in error's motion, was of the opinion that the plaintiff in error must show this fact before it would be entitled to maintain its suit. In other words, that the Court could not indulge the presumption that the statute of this State regulating foreign corporations had been complied with, and, therefore, dismissed the suit.

It is insisted by plaintiff in error that, in the absence of evidence tending to show that plaintiff in error has failed to comply with section 122 of the Act of 1891, the Court will presume that it has complied with said Act. In other words, there will be no presumption that it has

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violated the law of the State, but rather the presumption that it has complied with the law.

We are of the opinion that this question is settled in favor of the contention of the plaintiff in error in the case of *Young v. Iron Co.*, 85 Tenn., 200, in which case it was expressly held that, in the absence of proof to the contrary, the Court will presume that a foreign corporation has filed a copy of its charter with the Secretary of State, and that it is lawfully, and not unlawfully, exercising its faculties in the State under the terms of the legislative permission by which it is here adopted.

But it is insisted by the defendant in error that the more recent case of *Cary-Lombard Lumber Co. v. Thomas*, 92 Tenn., 587, holds to the contrary. In that case it expressly appeared from the proof that the corporation had not complied with the Act of 1891 above referred to by causing an abstract or memorandum of its charter to be registered in the county where it was doing business, as required by said Act, with the Secretary of State, and it was, therefore, held that certain lumber contracts of the plaintiff in error were invalid and could not be enforced in the Courts of this State, for the reason that the Act had not been complied with. In discussing the question of illegality the Court said:

"The illegality of these transactions is not set up in the pleadings, but only appears from the proof, and the Chancellor held that, in this condition of the case, he would not refuse complainant relief upon the presumption that no abstract had been recorded prior to July 28, 1891. In this we are of opinion that the Chancellor was in error.

"The Courts will deny any relief upon any illegal contract or transaction, whenever the illegality is made to appear, whether in the pleadings or proof, and will repel

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the party guilty of the illegality from the Court whenever the fact appears.”

The Court continuing, said:

“In order to entitle the complainant to any relief, it must show affirmatively that it had complied with the law; until that is done, all its transactions are illegal. The burden of proof being upon it, the Court can presume nothing in its favor, and can only hold such of its contracts enforceable as it shows were made after it had complied with the law enabling it to make a valid contract, and to transact business.”

We think the above language of the learned judge who wrote the opinion in that case was aside from the question presented, and is dictum. In that case the proof showed that the Lumber Company had failed to file an abstract of its charter with the County Court Clerk of Shelby County, the county in which said contract was made, as required by the Act hereinbefore referred to, and, therefore, it could not recover upon any contracts made prior to the date of filing an abstract of its charter as required by statute.

We hardly think that the Court intended to hold that, in the absence of any evidence tending to show that a foreign corporation has not filed a copy of its charter with the Secretary of State, as required by the Acts of 1891, the Courts must presume that it has not complied with the law, and, therefore, cannot enforce any contract made in this State. Such a holding would be out of harmony with the general rule.

By the provisions of the Act of 1891 it is made a misdemeanor for a foreign corporation to fail to comply with said Act with reference to filing an abstract of its charter in the office of the Secretary of State, and makes it subject:

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to a fine of not less than \$100.00, nor more than \$500.00, in the discretion of the jury trying the case.

In the case of *East Tennessee, etc., Railroad Co. v. Stewart*, 13 Lea, 432, it was held that no presumption will be indulged that a person has violated the law. There is always a presumption in favor of the validity rather than invalidity. *Farnsworth & Reaves v. Vance & Fleming*, 2 Cold., 108, 121; *Swan v. Roberts*, 2 Cold., 153.

In *Singer Mfg. Co. v. Jenkins* (Ohy. App.), 59 S. W., 660, it was held that, in the absence of proof to the contrary, it will be presumed that an agent required to take out the license required by the Revenue Act of 1895, for the privilege of selling sewing machines, made no sales after his license expired.

In R. C. L., Vol. 12, Sec. 79, the rule is announced as follows:

"It may be stated as a general rule, that in an action by a foreign corporation, the complaint need not allege compliance by the plaintiff with a domestic statute prescribing the conditions on which such corporations may do business in the State. Compliance with the statute will be presumed unless the failure to comply therewith appears on the face of the complaint, and the failure to comply with such statute is held to be a defense which must be taken advantage of by answer. This rule applies, though the action is on a contract made within the domestic State."

Also see note, 13 Anno. Cas., 69; Note, 2 Anno. Cas., 1005.

We are clearly of the opinion that our Supreme Court never intended; in the case of *Cary-Lombard Lumber Co. v. Thomas, supra*, to hold, in the absence of proof that a foreign corporation had not complied with the statute regulating such corporation doing business in this State, that

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the Courts will presume that there has been no compliance, and that such corporation is violating the law, which subjects it to a penalty for failure to comply; but it must, at least, appear from the proof that there has not been a compliance. Otherwise, the Court will indulge the presumption that the statute has been complied with.

It is next insisted that the plaintiff below cannot recover upon the facts of the case. It is insisted that the evidence shows that the defendant in error notified the plaintiff in error to cancel the contract for the advertising before any portion of it was put in the cars, and this the plaintiff in error refused to do. It is insisted that the defendant in error had the right to cancel the contract, and the plaintiff in error's remedy was to sue for a breach thereof. It is insisted that the plaintiff in error could not go ahead, after it had been notified to cancel the contract, and put said advertising in the cars and recover the price of same.

There was evidence offered by the plaintiff in error upon the trial in the Court below that, notwithstanding it was notified by the defendant in error to cancel the contract, it refused to do so, but went ahead and inserted the advertising according to the contract, and after it was inserted, defendant in error agreed to pay for it, and did actually pay \$15.00 upon the contract price of said advertising.

The Circuit Judge did not set the judgment aside on the ground that he was not satisfied that the preponderance of the evidence showed that the defendant in error owed the account; had promised to pay it after the advertising was inserted, and did, in fact, make a payment on it; but solely upon the ground stated in the defendant in error's motion for a new trial, namely, that the plaintiff in error had failed to offer proof that it had complied with the statute requiring foreign corporations, before attempting to do

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business in this State, to file a copy of their charters in the office of the Secretary of State.

We think the clear preponderance of the evidence establishes the liability of the defendant in error for the account upon the facts, and we will assume that this was the conclusion reached by the trial judge, because he rendered judgment on the account, after hearing the proof, in favor of the plaintiff below, and it is manifest that this judgment was only set aside for the reasons hereinbefore stated.

It results that the judgment will be reversed, and a judgment in this Court will be entered in favor of the plaintiff in error, Barron G. Collier, Inc., for the sum of \$173.98, interest and costs of suit.

Robilio v. Webb.

JOE ROBILIO v. W. L. WEBB.

Writ of certiorari denied by the Supreme Court, 1917.

1. JURY TRIAL. *Misconduct of the jury. View of situs and instrumentalities without consent. Presumption of prejudice.*

Where in a personal injury case the width of intersecting streets is in dispute and also where it is material to determine the length of the fender of an automobile and its distance from the wheels it is highly improper in the jury to examine the premises or a similar automobile without consent of the parties or the direction of the court; and where this is done the verdict rendered must in general be set aside. The presumption of prejudice will be indulged notwithstanding the assertion by the jurors that they did not regard the inspection.

2. REMARKS OF THE COURT IN THE PRESENCE OF THE JURY.

It is error for the court to assume the function of deciding that there is no conflict between the testimony of a witness upon a former trial and the one then being had when there is some doubt as to this conflict. Nor is it proper for the court to make remarks in the presence of the jury in explanation of the conduct or language inserted in the declaration for the purpose of showing that it was the language of the lawyer and not of the litigant.

3. EVIDENCE IMPEACHING OR REFLECTING UPON WITNESS.

The opposite party has the right by cross-examination to elicit information as to the habits, associations and police record of a witness.

4. PLEADING AND PRACTICE. *Averment and declaration of joint negligence where the evidence shows negligence of one party.*

A plaintiff who has alleged the joint negligence of two defendants nevertheless has the right to go to the jury where his evidence tends to show negligence of one defendant only.

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5. **SAME.** *Nonsuit as to one of joint defendants sued in negligence.*

A plaintiff who has averred joint negligence of two defendants in his declaration may before submission to the jury dismiss as to one defendant and proceed against the other.

FROM SHELBY COUNTY.

Appealed in error from the Circuit Court of Shelby County, Part III. T. B. PITTMAN, Judge.

PHIL CANALE for Plaintiff in Error.

T. F. KELLY for Defendant in Error.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

WEBB sued plaintiff in error Robilio and one Carberry for damages claimed to have been sustained by him while a passenger in the taxicab of the latter. He averred that both machines were running at an excessive rate of speed and in violation of the ordinances of the city of Memphis, and that the car of Robilio was exceeding the statutory speed limit, and that the two machines while being thus operated collided at the intersection of Linden and Third streets, in the City of Memphis, resulting in personal injury to plaintiff.

Carberry also instituted suit against Robilio for damages sustained by the destruction of his taxicab in consequence of the collision. Both suits were tried together. Before the conclusion of the trial Webb took a non-suit as to Carberry and elected to proceed against Robilio alone. The result as between Webb and Robilio was a

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verdict and judgment of \$2,000.00. Robilio has appealed and has assigned in this Court forty-six errors. We have carefully considered every one of these and do not believe that above six of them need specific treatment.

We shall dispose of assignments one to eight, inclusive, by saying that there was both material evidence to sustain the averments of negligence and to warrant a submission of the case to the jury; and also that the question of Webb's proximate contributory negligence was for the jury. It was not essential to a recovery that the evidence show that the accident was occasioned by the concurrent negligence of Carberry and Robilio as averred in the declaration. Webb had the right to take a non-suit as against the one or the other and recover upon the showing of negligence of the remaining defendant, although he used averments in the declaration to the effect that the negligence was joint. This is not a departure from the general rule requiring a plaintiff to prove his case as alleged. We have no exact authority. The nearest approach in Tennessee is that of *Hunter v. Robeson*, 95 Tennessee, 124, wherein it was held that under a declaration charging a conspiracy and a joint operation resulting in damage, the plaintiff might recover upon showing individual action resulting in damages.

We find merit in assignment number 9, predicated as it is upon the action of the Court in asserting in the presence of the jury that certain testimony of Carberry upon another trial was not in conflict with his evidence given in the instant case. It appears to us that there was some conflict such as entitled plaintiff in error to the unbiased judgment of the jury.

Assignments numbers 10, 11, 12, 13 and 14 also have merit. They are directed at the action of the Court in refusing an examination touching the personal habits and

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conduct of one Gerber, a very material and stalwart witness for plaintiff below. It was competent to elicit information as to this man's habits, associates and police court record as bearing upon his credibility: *Zanon v. State*, 97 Tennessee, 101.

The basis of assignment number 15 was an interrogatory propounded to Carberry as to whether he and his lawyers had been in conference with the defendant below and his attorney concerning the lawsuit. This was a pertinent inquiry, especially as plaintiff below had dismissed as to Carberry and thus afforded some basis for the showing of co-operation, and thus eliciting matter very materially affecting the credibility of Carberry as a witness.

Assignment number 29 is aimed at language of the Court used in the presence of the jury with respect to the fact that Mr. Kelley, the attorney of Webb, had furnished the language inserted in the declaration, and that Webb had not done so. This remark might have had some weight with the jury.

All the foregoing assignments held by us to possess some merit do not bring to light matters of pronounced prejudice and materiality; and they might not warrant of themselves a reversal. But we are now about to consider matters of such importance as to make a reversal unavoidable.

It is urged in assignment number 41 that after the jury had been charged and had the case under consideration, one of its members went to the point of the collision and made an estimate of the widths of the streets, and returned to or came to the jury room and made a statement as to the width in conflict with the testimony given on the trial. This juror admits having done so, stating that he reported to the jury or to some members of it his estimate of the width of the street as being forty feet.

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The testimony of the plaintiff and possibly others was that the width was some sixty or seventy feet. Owing to the contending theories as to how the collision occurred and who was to blame, the width of the two streets became a material issue.

In assignments numbers 42 and 43 it is charged that during the deliberations of the jury some four or five of them were upon the street when one of the number called their attention to the position of the bumper or fender upon a Cadillac car, such as was being used by Robilio at the time of the collision. The jurors examined the car, particularly with reference to the distance between the bumper and the tires and its connection with the chassis. This was also a material consideration because of the respective contentions as to how the accident happened. The collision undoubtedly took place at a street intersection and while the operators were driving at right angles and toward a common point. It was material to show the condition of the cars both before and after the collision. The jurors admit that they examined the machine on the street and discussed the result of their observation and compared their own estimates with those of a witness or two.

As usual, the jurors swore that these communications had no influence with them. But as we understand the authorities it is not the question of the degree of influence but as to whether the jurors actually received in some other way than through the medium of sworn testimony material evidence bearing upon the case. Nor have the Courts drawn any nice distinction as between prejudicial and non-prejudicial communications, deeming it the safer course to rule as improper the reception of evidence by the jurors from any other source than through legitimate channels. It is axiomatic that jurors must determine the

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cases heard by them solely upon the evidence submitted; and it is reprehensible in a juror to take a view of premises or to look at an article involved with a view of confirming or refuting the testimony of the witnesses heard by him.

The learned Circuit Judge thought this action of the jury was not prejudicial nor harmful. We have reached the conclusion that harmlessness cannot be assumed as a matter of course, and that unless we can say so, such conduct must be censured although not inspired by the winning party, nor by bad motives upon the part of the jury: *Sam v. State*, 1 Swan., 61; *Wade v. Ordway*, 1 Baxter, 229; *Street Railroad v. Simmons*, 107 Tennessee, 392; *Winslow v. Murrel*, 68 Main., 262; *Harrington v. Worcester*, 157 Mass., 579; *Pierce v. Brennon*, 83 Minnesota, 432; *Ewers v. Improvement Co.*, 63 Federal, 562. Nor we do think that such departure upon the part of the jury is to be condoned by virtue of Chapter 36, Acts of 1911.

For the errors indicated we feel constrained to reverse and remand for a new trial. We deem it unnecessary to treat of other assignments of error. We shall remark in conclusion, however, that we do not think that the Act of 1905, Chapter 73, is subject to constitutional attack; and we shall also observe that the execution of the replevin bond found in the record was virtually a waiver of any irregularities in the issuance of the attachment.

Webb is taxed with the costs of this Court.

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CLIFFORD SPELLINGS v. N., C. & ST. L. RAILWAY.

Writ of certiorari denied by the Supreme Court, 1917.

RES ADJUDICATA. *Action to recover damages under two statutes. Right of a party to bring suit upon same facts under the two statutes at different times. Election.*

A party suing for injuries must set forth all grounds of law and fact upon which he predicates recovery. He cannot bring a second suit upon facts or cause of action which he could have urged in the first trial. For instance, the owner of an animal killed by a railroad cannot wage a suit for non-observance of the statutory precautions and after losing the controversy bring a new suit for the killing of the animal on an unfenced track.

FROM CARROLL COUNTY.

Appeal in error from the Circuit Court of Carroll County. THOMAS N. HARWOOD, Judge.

J. W. MADDOX for Plaintiff in Error.

J. T. PEELER for Defendant in Error.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

THIS transcript discloses the following: During the latter part of 1915 plaintiff lost a mule by collision between a train of the defendant and the animal. He instituted suit for the alleged wrongful killing, recovered judgment before a justice, and the cause was appealed to the Circuit Court, in which tribunal the issues were de-

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cided against him. In his original warrant he had charged that the railway company had killed his mule while in the non-observance of the statutory precautions, or that the animal was killed upon an unfenced track. For some reason not shown he moved the Circuit Court and was granted permission to amend his warrant so as to have his suit stand for the killing of the mule upon an unfenced track. The cause was tried before Judge Harwood and a jury. The verdict was for the defendant. Plaintiff thereupon made an elaborate motion for a new trial, which motion was overruled, and final judgment of dismissal was pronounced. Declining to appeal, plaintiff sued out a warrant before another justice, alleging the violation of the statutory precautions as his ground of action. This latter suit was appealed to the Circuit Court, where it was determined against the plaintiff upon his demurrer to a plea of *res adjudicata* filed by the railway, setting up the history of the former proceeding. From the judgment overruling the demurrer and holding the plea good and dismissing the suit plaintiff has appealed and assigned errors.

We are constrained to affirm the judgment of the lower Court, notwithstanding the result to be that plaintiff must go without recovery for his animal.

It is evident that plaintiff could have alleged in his original suit the violation of the statute and also the failure to fence; or he could have recovered for the wrongful killing notwithstanding he had predicated his action upon the failure to fence, provided his warrant had contained the allegation of unlawful killing: *Railroad v. Young & Smith*, 1 Higgins, 208, and cases there cited.

We are bound to presume that Judge Harwood tried the case correctly in the first instance, or else there would have been an appeal. Hence the assumption which we must

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make is that the trial judge did not in the first instance err with respect to the form of the warrant or in the subsequent trial of the case.

The contention of able counsel for Spellings is that the issue arising upon the former trial was as to the liability of the railway for killing the mule on an unfenced track, and that having failed upon this point, he had the right to bring a new suit setting up the violation of the statute with respect to precautions. He relies upon the cases of *Pyle v. Pyle*, 134 Tenn., 370, and *Harris v. Mason*, 12 Cates, 678, as firmly establishing this doctrine. Without directing criticism at those decisions, it suffices to say that they were decided upon contentions urged by defendants with respect to independent or disconnected claims, whereas in the instant case there never was but one issue conceived of or conceivable, namely, the liability of the railway for wrongfully killing plaintiff's mule. This identical issue arises in the last suit. It is true that plaintiff seeks recovery upon a different question of law, but there is no variation as to the facts. Hence the conclusiveness of the former judgment, even giving full effect to the decisions cited. The old rule of former judgment has not been entirely abrogated. That rule was that when a party plaintiff raised an issue it was his duty to bring forward every contention and every legal aspect of that issue, and that the judgment was conclusive as to every fact or contention which might have been urged in the first suit.

It will not do to tolerate these piecemeal law suits. *Interest rei publicae ut finis litem* is a wholesome maxim. It is true that cases must not be determined upon technicalities; but when a party has his election of remedies he has no right to vex his adversary with more than one of them.

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The plea of *res adjudicata* in this case was good upon its face. Plaintiff was content to demur and not to take issue thereon. In such case we are bound to presume that the plea would have been sustained by the proof. Hence an additional reason for affirming the judgment. This is so ordered and appellant is taxed with the cost.

GUS McMICKEN v. AMERICAN ZINC COMPANY.

Affirmed by the Supreme Court, 1917.

MASTER AND SERVANT. *Simple tools. Hammer. No duty of inspection. Assumption of risk.*

The master owes no duty of inspection with respect to simple tools, such as a hammer, furnished an employe; and in the absence of knowledge of defective condition by the master there can be no recovery for injuries received by the flying of a sliver from the hammer while it was being used by the servant.

FROM KNOX COUNTY.

Appeal in error from the Circuit Court of Knox County.
VON A. HUFFAKER, *Judge*.

PICKLE, TURNER, KENNEDEY & CATE for Plaintiff in Error.

CORNICK, FRANZ, McCONNELL & SEYMOUR for Defendant in Error.

McMicken v. Zinc Company.

MR. JUSTICE HALL delivered the opinion of the Court.

THIS is an action of damages brought by the plaintiff in error seeking to recover of the defendant in error for personal injuries sustained by him on or about July 19, 1915, resulting in the loss of the sight of one of his eyes.

Upon the trial in the Court below, at the conclusion of the plaintiff in error's evidence, the Court sustained a motion for a directed verdict entered in behalf of the defendant in error, and plaintiff in error's suit was dismissed. From this judgment plaintiff in error appealed to this Court, after his motion for a new trial had been overruled, and the action of the Court in sustaining said motion for a directed verdict is challenged by the assignments of error.

The record discloses that the plaintiff in error, at the time of his injury, was in the employ of the defendant in error, and was engaged as a miner in its underground zinc mine. His declaration consists of two counts, but the cause of action stated in each is substantially the same, except that the averment in the first count charges that the plaintiff in error's eye was injured by a piece of stone, which was caused to fly and strike his eye while engaged in beating a large stone with an unsuitable and unsafe hammer furnished him by the defendant in error, the condition of the hammer being responsible for the injury.

The second count avers that plaintiff in error's eye was injured by a "sliver" of steel flying off the head of the hammer while being used by the plaintiff in error in the line of his duty, and the averment is that the head of the hammer was battered and raveled around the edges; the adhesion of the steel being thus broken up, leaving disconnected particles of metal fringing the head of the hammer, one of which broke with the use of the hammer, and that a "sliver" of steel thus released flew and struck the plain-

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tiff in error in the eye with such force and violence as to practically destroy the sight of his left eye, and inflicting a very painful and permanent injury.

The facts are substantially as follows: The plaintiff in error was employed as a common laborer by the defendant in error in its mines at Mascot, Tennessee. At the time he was injured he was working some 400 feet underground, and was engaged, in company with another employe of the defendant in error, in loading mine cars and breaking up rock or ore when necessary to reduce the size of the rock or ore so that it would pass through the ore chute. He had been performing this work for about fourteen weeks at the time he was injured. He had previously worked for the defendant in error some six or seven months, being engaged in unloading coal, cutting concrete, digging pits, and "first one thing and another, just general work."

The plaintiff in error and his companion went on duty at 3.30 P.M. on the date of the injury, and the injury occurred about 11.30 P.M. Before beginning work plaintiff in error and his companion went to the tool house of the defendant in error, which is also underground and near the place of work, and tools were given them with which to perform their work, by the tool keeper; the custom being that when a shift of hands went off duty they turned their tools into the tool house, defendant in error keeping some one there to receive and distribute the tools; the servant receiving tools being required to present a check to the tool keeper before such tools were turned over to him. When plaintiff in error and his companion went on duty they applied at the tool house and received two shovels, a pick and hammer. It further appears from the custom above indicated that when an employe applies for tools in the manner stated, he would probably not get the same one that he had used the day before, and in this case the plain-

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tiff in error was given a hammer that he had never previously used, and while he was using the hammer in the breaking of a rock, which was too large to pass through the ore chute, a "sliver" of steel, or some other hard substance, flew and struck him in the eye, resulting in almost the entire loss of its sight. Plaintiff in error was pounding on the rock in the usual and ordinary way when the accident occurred, and had only made three or four licks with it. The undisputed evidence is that the face or striking part of the hammer was worn and battered all around the edges, and that this condition was open, obvious and patent to the most casual observer. In other words, the condition of the hammer could have been observed by the plaintiff in error by the most casual observation, but he says that he did not notice its defective condition, although both he and his companion had carbide lamps on their caps, and it does not appear that they experience any difficulty in seeing and discovering objects in the portion of the mine in which they were engaged on account of darkness.

We are clearly of the opinion that, under the recent holdings of our Supreme Court in the cases of *Silvey v. Drill Company*, 128 Tenn., 675, and *Roofing & Mfg. Co. v. Black*, 129 Tenn., 31, plaintiff in error assumed the risk incident to the defective condition of said hammer. Under the holding of our Supreme Court in these cases referred to, the hammer which plaintiff in error was using at the time he was injured, must be classified as a simple tool. It was held in these cases that no duty rests upon the master to inspect a simple tool to discover defects of which the employe using the tool should be aware, and that there can be no liability on the part of the employer for a failure to inspect such a tool at the time of furnishing it to the employe, on account of injury resulting from a

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defect in said tool, unless the employer has actual knowledge of such defect.

In the case of *Roofing & Mfg. Co. v. Black, supra*, the Court said:

“The general principle is that a master is bound to inspect tools or appliances furnished by him to his workmen, and to keep them in sufficient repair. If, however, the tools or appliances are common or simple tools, there is an exception to this general rule. The presumption in such cases is that the servant is equally conversant with the nature of such simple or common tools, and is in as good a position as the master to discover any defects therein.

“The master’s opportunities for learning of a fault in a tool of this kind are no better than the opportunities of the servant. By reason of the character of such an implement, no superiority of knowledge on the part of the master exists, or can be presumed, as to defects therein. The foundation of the simple tool doctrine is the assumption that the knowledge of the master and servant must be equal.

“Such a presumption cannot be indulged where the master has actual notice of a defect, where the proof shows his knowledge is superior. If the master is, as a matter of fact, cognizant that a tool with which he furnishes an employe is in such a condition as to render its use by the employe dangerous to the latter, he will be liable for an injury sustained by the employe in the use of such an implement, where the defect is not known to the employe, and is not of such a nature as to be discovered by that observation which would naturally accompany its use.”

The Court continuing, said:

“Although the master is not required to inspect simple tools, previously furnished to the employe, to discover defects of which the employe using such implements should

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be aware, and although generally no inspection of a simple tool may be necessary at the time it is delivered to an employe, yet if the master furnishes such a tool, with a dangerous defect of which he has actual knowledge, he is negligent. He should not be permitted to expose the servant to such a risk, particularly if the defect is of such a character that it might be overlooked by the servant. There is testimony in this record that the defective condition of the round of the ladder which broke was not readily discoverable."

There is no evidence in the suit at bar that the master had any actual knowledge of the defect in the hammer, which caused the injury to the plaintiff in error. There is nothing in the record to take the case out of the general rule announced in the cases above cited. Plaintiff in error does not claim that he could not have discovered the defect in the hammer by the most casual observation. He simply says that he did not notice the defective condition of the hammer. It is clear from the evidence that the defect in the hammer was as open, obvious and patent to the plaintiff in error as to the master, and, therefore, the case falls squarely within the rule announced in the two cases cited above.

The judgment of the Court below will be affirmed with costs.

Street Railway v. Hudson.

MEMPHIS STREET RAILWAY v. JEFF D. HUDSON.

Writ of certiorari denied by the Supreme Court, 1917.

ALLEYS. *Rights of pedestrians and vehicles users and street car companies are not equal as at street crossings.*

The rule of equality of right to use street intersection recognized as existing as between street car companies upon the one hand and pedestrians and vehicle users upon the other, has no application to an intersection of a well recognized street and a narrow alley in a city. The rights of street car companies at such points are superior.

FROM SHELBY COUNTY.

Appealed in error from the Circuit Court of Shelby County, Part 3. T. B. PITTMAN, Judge.

S. P. WALKER for Plaintiff in Error.

ANDERSON & CRABTREE for Defendant in Error.

SPECIAL JUSTICE SANSOM delivered the opinion of the Court.

THIS is an action for the recovery of damages for alleged personal injuries growing out of a collision between the Memphis Street Railway Company and an auto truck in which the plaintiff Hudson, who was a minor, at the time was riding and from which, under the averments, he was thrown and injured. For purposes of convenience in writing this opinion, where the word plaintiff is used it will mean the plaintiff below, Jeff D. Hudson, and where de-

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fendant is used it will mean the defendant below, Memphis Street Railway Company.

The declaration in the case filed November 17, 1915, is in two counts, but because the plaintiff abandoned the second count in the lower Court it will not be necessary to treat of the case in any other view than that presented in the first count.

In the declaration it is averred that on or about the 13th of October, 1915, on Main street, in Memphis, plaintiff was riding as a passenger on an automobile truck, being under the control of the driver thereof, and the defendant negligently and carelessly ran or caused one of its northbound cars to run into and against the truck, as the result of which the plaintiff was thrown therefrom and seriously and permanently injured. It is alleged that the defendant was guilty of negligence in that its motorman was not upon the lookout ahead and did not exercise proper care and precaution to control his car by stopping his car, knowing what the peril of the plaintiff was, or by the exercise of reasonable care ought to have known; that the defendant was guilty of negligence in that its motorman saw the probability of the collision and failed to ring his bell or sound any alarm to warn the driver of the truck, in which the plaintiff was riding, of the impending danger.

It is further averred that as a result of the negligence of the defendant the plaintiff was injured in his back, shoulders, neck, head and chest, and that his injuries were permanent; that he was made sick and sore thereby and suffered much mental and physical anguish; that at the time of the filing of the declaration the plaintiff continued to suffer great pain; that his health had been permanently impaired and his earning capacity greatly de-

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creased; that he was greatly damaged and sues for \$5,000.00 to cover same.

To this declaration the defendant interposed two pleas, not guilty and contributory negligence.

Under the issues thus raised proof was taken and the case submitted to the jury by the Court below. After argument of counsel and charge of the Court, the jury returned a verdict in favor of the plaintiff and against the defendant for \$750.00. There was motion for new trial, which was overruled, and the defendant has appealed to this Court and assigned errors, seven in number, only one of which, however, will be specifically discussed, as the disposition thereof will result in a necessary reversal of the case and its remand for a new trial in the lower Court. The error assigned and which is specifically considered is in these words:

III.

“The Court erred in charging the jury as follows: ‘The Court further charges you, gentlemen, that the rights of plaintiff and defendant at said street crossing were the same. It was the duty of each to exercise ordinary and reasonable care in approaching said intersection, and to do so at such rate of speed as to have his vehicle under such control as that if an obstruction appeared on the crossing ahead of him he could stop his vehicle and prevent collision with said obstruction and the one arriving at said crossing first had the right to cross ahead of the other.’”

The facts: It appears from the record that this accident occurred on Main street, in the City of Memphis, at a point about one-half way between Union and Gayoso streets. Half way between Union and Gayoso streets an alleyway crosses Main street, which runs at this point

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north and south, Gayoso, Union and Barbara alley all running east and west. The defendant operates a double line of tracks upon Main street at the point in question. Main street at this point is fifty feet wide between curbs. The distance between Gayoso and Union streets is about 350 feet. Barbara alley, running parallel with Union and Gayoso streets, is about fifteen feet wide. It has a walkway for pedestrians, cinderlithic, on each side approximately two feet in width and thus, as the Court gathers from the record, although this is not perfectly clear, the passageway for vehicles between the footway on either side of two feet is only about eleven feet. It appears that Barbara fruit store fronts on Main street, and Barbara's alley extends along the side of the fruit store, there being another alley in the rear of this storehouse. It is a fact as shown by the record that the houses upon Barbara alley are not numbered. The alley is a public alley dedicated to the use of the public. It crosses Main street at the point where the accident occurred. It appears as a fact that the name of this alley, Barbara's, is given by an ordinance regularly passed by the city. It has no car line upon it. It is further apparent from the record that the use of this alley is largely by the various stores, warehouses, etc., abutting upon the alley in rear or side thereof for purposes of getting their goods in and out of their establishments, but that it is, as stated, dedicated a public alley, and while it is used more largely by storehouses and warehouses abutting thereon, yet the public have the right of user therein and it is used by the public.

It further appears that Barbara & Co., who are fruit dealers, used in transporting their articles of merchandise a motor truck and that upon the morning in question, October 13, 1915, about ten o'clock, the plaintiff, an employe of Barbara & Co., was upon this motor truck,

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being driven by another of the employes of Barbara & Co., the plaintiff's position being at or near the rear of the truck, and his duty being to watch carefully to see that none of the boxes of fruit fell from the motor truck or were taken therefrom, and to discharge such other duties as might be assigned him. This motor truck apparently from the record was going north on the right hand side of Main street, intending to go into Barbara's alley, which was on the west side of Main street, and thus it became necessary for it to, and did, cross over from the east to the west side of Main street, reaching the mouth of the alley on the west side of Main street. At this point it appears that there was another truck in the alley attempting to get out, and the truck belonging to Barbara & Co. was backed after reaching the mouth of the alley in order to permit the other truck to come out, and in backing it, ran upon the tracks of the defendant, and as it did so, apparently from the proof, the power was disconnected in some way, so that it was left standing upon the tracks, although the proof is not perfectly clear along this line. It further appears that two of defendant's cars were going south upon Main street, and one of its cars going north thereon; that the one going north passed the first car going south just before reaching the point where Barbara's alley crosses Main street, and thus at this point of meeting between the two cars the motorman in charge of the northbound car had his view of the motor truck belonging to Barbara & Co., upon which the plaintiff was riding, obstructed as it backed from the mouth of the alley toward and upon the tracks. It appears that when this truck upon which the plaintiff was a passenger backed upon the car track that the northbound car belonging to the defendant ran against the truck, shoving it or knocking it a sufficient distance forward so that it came in con-

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tact with the rear southbound car of the defendant and thus the truck was to a degree wedged in between the two cars. It should be stated that the southbound car as it approached the point of contact seeing the truck back upon the tracks was stopped by its motorman so that at the time the northbound car knocked the truck forward the southbound car was standing still. So that there is no complaint in this regard touching this car.

The question of the speed of the car, nor the severity of the injuries, nor the facts further, are necessary to be set out in the opinion of the Court just at this juncture. There is no question but that the plaintiff was injured more or less. The real question presented to the Court for determination is whether or not the lower Court was right or wrong in charging the jury in substance that the rights of parties at this point upon Main street where this collision occurred were equal. It is the insistence of the defendants that this is not the law and the insistence of the plaintiff that the Court was right in charging the jury as he did.

We think there is no question, and we understand there is no question as between counsel representing the contending parties in this case, but that the law is, and it is a well-established rule in Tennessee, that street railway companies have the superior right of way between crossings upon the highways and thoroughfares of cities. This proposition is very clearly enunciated by the law writers, and we do not understand that it is controverted by counsel for defendant in error: Booth on Street Railways, Section 303, 304; *Street Railway Co. v. Howard*, 102 Tennessee, 474-483.

Manifestly and beyond question at street crossings the rights of parties are equal. The Street Railway Company has no superior right to pedestrians or other occupants of the highway at street crossings. It should have

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been stated in outlining the facts that at the crossing of Main Street and Union Street in Memphis just north of where this accident occurred, 175 feet distant therefrom and at the crossing of Gayoso and Main Street just south of where the accident occurred, 175 feet distant, officers are stationed whose duty it is to care for and aid in the avoidance of collisions and injuries, and who are nominated "traffic officers" to that end. At the point on Main Street where Barbara alley crosses there is no such officer stationed. The question is: Is Barbara alley a street, highway or thoroughfare in Memphis that under the facts and circumstances developed in this case is brought within the rule where the rights of parties are equal and co-ordinate? We have reached the conclusion that it is not such a crossing as was contemplated by the ordinance or as comes within the purview of the law making street crossings a point at which the rights of the parties equal and the same.

It might be interesting to the writer to go into a technical discussion of the difference between an alley, street, avenue, boulevard and highway, but it is not believed that it would be fruitful of practical results in so far as reaching the right conclusion of the instant controversy is concerned. Coming down to the reality of the proposition there is no question in the mind of the writer but that an alley is a narrow street, and there is equally no question that under certain conditions a narrow street might be just as much a highway or thoroughfare as a broader street, so that in the interpretation of the rights of parties growing out of questions of superiority of right or equality of right as affecting traffic arrangements and ordinances these questions are more largely dependent on the use and purpose to which a highway is put than to the relative width of an alley or boulevard. A street might be 100 feet wide, and yet not have a dozen vehicles pass over it during the day,

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while an alley way only ten feet wide might have a constant stream of vehicles passing one after the other during the entire day. The ordinance in question applying itself to the situation is a "traffic" ordinance, and from its name and attribute necessarily applies itself more directly and absolutely to *traffic conditions* than to the number of feet in width the street may occupy. Manifestly the crossings at Union and Gayoso are of such character in respect to traffic as that it is right and proper that the rule of equality in respect of right of occupants apply. But in addition to that the city of Memphis in its own behalf and for the protection of the lives and property of the occupants of the highway have stationed traffic officers so as to help, aid and assist the occupants of the highway in the avoidance of collisions and injury to each other.

Street railways occupy only a part of Main Street, and not the whole thereof. According to the record in this case there is room on either side east and west of the tracks of the Railway Company both for pedestrians upon the sidewalks and for vehicles in the street. The Railway Company cannot occupy any part of the street except that part upon which rails are stretched, and as held in the *Howard Case, supra*, it has a superior right over that part of the streets occupied by its tracks between crossings, but this superior right limits itself to the part of the highway occupied by its tracks because as stated it cannot go outside of or beyond its tracks.

In the determination of these sort of questions the rights and interests of the public must be taken into consideration because that is the interest that is cared for especially by the officials in charge of the municipality; in looking after the street department. And in the passage of traffic ordinances the idea and purpose under the necessary legal presumption is, to promote equal rights and privileges as be-

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tween Street Railway Companies, automobiles, wagons, footmen and horsemen. When one takes passage in a street car they do so with the apprehension that they will be transported at a reasonable rate of speed, and not in anticipation of any idea that their progress is to be impeded unnecessarily at every alley way and crossing within the city limits, and to hold that between street crossings such as those upon Gayoso and Union Streets a Street Railway Company has no superior right to so much of this street as is occupied by its tracks when it is crossed only by an alley way, although that is dedicated to the public, but which is largely used by the abutting property owners as well as a passageway by the public, would be to unnecessarily impede travel and burden the easements and rights of the Street Car Company within the city limits. Municipal authorities have the interests of the public at heart and in mind in the passage of such ordinances, and the interest of the public in this day of activities is toward rapid progress and not slowness, and when we say rapid progress we mean of course rapidity limited to the degree of care incident to and attendant upon surrounding conditions and circumstances. If the crossing of this alley with Main Street at the point where the accident occurred was burdened with the same degree of activity and density of traffic as is the crossing at Union as well as Gayoso Street, then the Court would have no hesitancy in holding that it was a street crossing within the legal contemplation where the rights of parties were co-equal and co-extensive. But under the facts developed in this case we are of opinion that it does not come within the rule; that it is an alley way within the narrower but not the narrowest sense of that term, and until it shall have attained that degree of traffic, use and travel that shall so warrant, this crossing

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shall remain an alley way and not a street crossing within the traffic ordinances and rules.

This holding results in the reversal of the case upon the error committed in the charge of the Court under assignment number three. That being true, the case is necessarily remanded without going further into the other assignments. The case is reversed and remanded for a new trial.

**JOHN BLACK ET ALS. V. LONE MOUNTAIN LUMBER
COMPANY.**

Affirmed substantially by the Supreme Court, 1916.

1. **MASTER AND SERVANT. *Logging train. Assumption of risk. Knowledge of track.***

There is no presumption that the engineer of a logging train has knowledge of the defective condition of a railroad track.

2. **SAME. *Assumption of risk from known defects. None where servant had right to assume that repairs had been made.***

The assumption of risk arising from known and appreciated defects has no application where the engineer had the right to assume and believe that the defective track over which he was running had been repaired.

3. **PRACTICE. *Motion for a new trial and dismissal of suit.***

The circuit judge undoubtedly has the right in acting upon motion for a new trial to grant the same and then sustain a motion to dismiss upon the ground that there was no evidence justifying submission of the case to the jury. When this is done the court clearly sustains the motion for a new trial, and there arises in the losing party the right to except and have the action reviewed.

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4. NEW TRIAL. *Party obtaining may justify upon other grounds.*

A party in whose favor a new trial has been granted may show that the court should have sustained his motion upon other grounds than those acted upon; and in general the party complaining of the granting of a new trial has the burden of showing that no ground urged was sufficient for that purpose.

5. SAME. *Question reserved as to what should be done when the court improperly sustains a new trial and dismisses suit.*

What should be done in the appellate court when the conclusion is reached that the trial judge was in error in sustaining the motion for peremptory instructions in acting upon the motion for a new trial is a question that is reserved. But the court ruled that when questions presented in the motion for a new trial that ought to be considered by the trial judge as a condition precedent to a review by the appellate court, such as excessiveness of verdict, etc., there should be remandment for new trial. But there may be cases where it would be the duty of the appellate court to reinstate the verdict and pronounce judgment thereon.

6. EVIDENCE. *Photographs. Change of conditions.*

Photographs of a situation are inadmissible when there have been material changes in the situs.

FROM MORGAN COUNTY.

Appealed in error from the Circuit Court of Morgan County. ZEN C. HICKS, Judge.

L. D. SMITH for Plaintiff in Error.

CASSELL & HARRIS and JOHN A. CHAMBLISS for Defendant in Error.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

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WE shall refer to the parties as plaintiffs and defendant, just as they appeared in the lower Court. Plaintiffs are administrators of one Colquitt Black, deceased. They brought this action to recover for his alleged wrongful death because of the negligence of the defendant in whose employ Black was at the time of his death in the capacity of a logging train engineer. It was averred that the defendant was a corporation engaged in the operating of a large saw-mill, and that as an incident thereto it owns a line of railway extending from its sawmill into the woods for the purpose of transporting the timber from the forest to the place where it was to be sawed; that deceased was in the service of the company as an engineer in charge of the engine which pulled the logging trains that ran upon the railway track aforesaid; that this logging train consisted of the engine and two cars, and that the method of operation was to back the same from the mill into the woods, where the cars were loaded and thence hauled back to the mill. It was alleged that on the day of the accident in which Black met his death the logging train had been backed into the woods as usual, with Black upon the engine in charge, and that the two cars were loaded under the direction of the general manager of the defendant; that the rear car was heavily and improperly loaded with logs; that at a signal from the general manager, who supervised loading and controlled the operation of the company, Black started back, driving his engine and pulling the cars, when and because of defective and improper appliances used by the defendant, the negligent overloading of the rear car, and the dangerous and unsafe condition of the track, and for other reasons, said train was wrecked or derailed, throwing Black beneath the engine, where he was scalded, wounded and bruised in such way as that he subsequently died.

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There was a plea of not guilty. Upon the trial the Circuit Judge declined to grant the motion of the defendant for peremptory instructions, and submitted the issues to the jury. There was a verdict for \$12,000.00. Defendant made a motion for a new trial, assigning among other grounds of error the refusal of the Court to sustain its request for a directed verdict. The learned Circuit Judge concluded during his deliberations upon the motion for a new trial that he was in error in this regard; and he proceeded thereupon to sustain the motion for a new trial and to correct the error which he deemed he had committed, and he ordered a dismissal of plaintiffs' suit. The latter have appealed and have assigned two errors which challenge the correctness and propriety of the steps taken by the Court upon the motion for a new trial.

Some question is made by learned counsel for appellants as to whether the Court did grant a new trial. But there can be no doubt upon this point. Nor need we at this day question the power of a Circuit Judge to correct the error of not granting peremptory instructions when this is assigned as error upon motion for a new trial: *Barnes v. Noel*, 131 Tenn., 126. This Court passed upon this question four years ago in the case of *Railroad v. Hamilton*. We therein held that this was permissible. Our disposition of that case was affirmed, and we have since acted upon the assumption that it was proper practice. It is certainly logical, and violates no right or guarantee of the litigant to a trial by jury.

There arises upon this record the interesting question as to what the reviewing Court should do in case the conclusion was reached that the Circuit Judge was in error in granting the motion for a new trial and then ordering dismissal upon the ground that the case should not have gone to the jury. No case of which we are aware treats of the

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point. Some light can be had from the Acts of 1875, Chapter 106, and from the rules of practice obtaining where the action of a Circuit Judge in sustaining a motion for a new trial is reviewed. It is well known that where a Circuit Judge grants a motion for a new trial with or without the assigning by him of reasons therefor, it is incumbent upon the party assailing the action to show that the Circuit Judge was not justified upon any ground. At least the winning party may demonstrate if he can that he was entitled to a new trial for other reasons than those specified by the Court.

As to what judgment this Court should pronounce in case the conclusion should be reached that no new trial should have been granted for any reason given or assignable, it might be said, construing the Act of 1875 authorizing the correcting of all errors committed by Circuit Judges in granting or refusing new trials, that the judgment of the lower Court should be reinstated and treated as affirmed. But we reserve this question for further elaboration and discussion.

Our first point of inquiry is as to whether the Circuit Judge acted properly in the first instance in submitting the case to the jury. If so, it follows necessarily that he committed error in setting aside the verdict upon that ground and then directing dismissal.

There was material evidence tending to show the following state of facts in addition to or by way of explanation of the averments of the declaration, it being admitted that the defendant was engaged as was alleged, and that Black was in its service on the little logging engine at the time he got hurt. This railroad extended into the woods some mile or two. It was a narrow gauge, constructed of small steel rails. It crossed a trestle some twenty-five or thirty feet wide at a point not far from the end of the line. The

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rails were laid upon ties that in turn rested upon stringers stretched across the sink; the ties were not fastened to these stringers except possibly one or two of them at either end, and these stringers were logs upon which the ties were placed, and upon which ties the rails were laid and attached; that there was a curve in the track at this trestle; that on the morning of the accident Black had pushed two cars with his engine to the point in the woods where they were to be loaded with logs, the general manager of the company being present and superintending the work; that at the time the logs were being loaded Black remained upon the engine in discharge of his duties; that the logs were piled very high upon the rear car and were fastened with some sort of chain; that after the cars were loaded Black was signalled to move off, which he did, with a fireman or brakeman near him; that the general manager and others were upon the cars, some upon the rear; that the engine moved off at a moderate speed, but that after a short while it started going much faster; that after running some 150 or 200 yards the rear car turned over, and then the next car and then the engine, carrying Black with it and scalding him; that Black remained with the machinery, working with the engine and reversing it and trying to check the momentum of the train when it turned over.

We think the question as to whether the rear car was improperly loaded was debatable, and therefore for the jury. It was almost demonstrated that the track on the trestle was not constructed with an eye to safety, and that this was or ought to have been known to any master who exercised any degree of care for the safety of his employes. It was shown that the rear car turned just about the time the engine reached the trestle, and that the turning of the next car immediately followed, and that this twisting caused the track that was laid upon the trestle stringers to

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slide off and throw the engine to the ground. There is no direct evidence to the effect that the engine equipment was defective; but it is reasonably certain that the proximate cause of the wreck was the bad condition of the track and the overloading of the rear car. At all events the whole situation should have been taken into consideration and submitted to the jury for determination of the question as to whether or not the master had taken reasonable precautions and performed its continuing duty of caring for the safety of its servants, and of refraining from the unnecessary exposure of those servants to the dangers of the employment.

We are of opinion that the Circuit Judge was in the first instance right in submitting to the jury the defenses of contributory negligence and assumption of risk. We concede of course that these questions may at times be determined as matters of law. But this cannot be done when there is a substantial doubt as to whether there was an assumption of risk or as to whether the injured one acted otherwise than as a reasonably prudent person.

It is urged that Black knew the condition of the track and appreciated its dangers. Examined from one viewpoint it does appear that he was aware that the track was not fastened to the stringers; but it was clearly established that he had remonstrated about this, and had directed the trackman to remedy the defect, and had gone to the trouble of making splicers himself. It was admitted that it was not Black's duty to supervise the track or to keep it in repair; and it is strange to say that he must be charged with knowledge of the condition of instrumentalities placed wholly in the keeping of other servants directly representing the master. At any rate he requested that the track be repaired, and provided the means, and there is no evidence denying the contention of appellant that Black as-

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sumed that the track had been repaired and was ignorant of the fact that it had not been done. It was shown that he had been in the service of the company a very short time, and that he was injured upon his second or third trip upon the section of road at which he was killed. As a matter of fact this part of the road had been opened up for use a very brief time before the accident. Hence the reason for denying the application of the doctrine of assumed risk and knowledge of conditions from daily contact. We doubt very much whether Black was familiar enough with the situation to have fully appreciated the dangers and thus elected to take his chances; and it is because of this doubt that this question should have been submitted to the jury.

There is nothing in this record to suggest that Black was guilty of contributory negligence. The contrary rather is shown. Hence the impossibility of making this a question of law.

While we have referred to improper loading and condition of the track as more immediately causing the accident, we are not to be understood as excluding from consideration some evidence from which it might be inferred that proper brakes and brake equipment were not furnished or properly placed, and also whether proper precautions were taken in view of all the surroundings.

When all things are considered we believe that the Circuit Judge was right in the first instance and wrong in the second, and that he was in error in sustaining the motion for a directed verdict.

We recur now to the question as to whether we shall affirm or remand. We have reached the conclusion after mature deliberation that it would be wholly inconsistent with our established rules of practice and procedure to reinstate the verdict and to affirm. It is true that by the

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Act of 1875 appellate courts are authorized to correct the errors of lower courts with respect to new trials. But at the same time there remain unaffected certain established principles and rules derived therefrom which cannot be ignored. For instance, it is the duty of the trial judge in a jury case to weigh the evidence and to coincide or disagree with the jury; and in general no verdict has any validity until it meets the approval of the trial Court; and it is also the prevalent view that the appellate courts cannot treat a verdict not thus approved by the Circuit Judge as of any validity. Hence the lack of power in our appellate courts to reinstate a verdict which did not have the sanction of the Circuit Judge on the facts, especially where there is much room for debate, such as we find in this case. In other words, where there is conflicting evidence, and where different conclusions are to be drawn, the disapproval of a verdict by the trial judge virtually annuls it and produces the necessity for another trial upon the facts. This is the rule followed in other jurisdictions: 2 Ruling Case Law, page 282. Especially is this true when the verdict is assailed upon other grounds not *weighed* by the Circuit Judge, such as excessiveness of verdict, the insufficiency of evidence upon certain points, preponderance of evidence, etc.

We apprehend that if the facts were beyond dispute or reasonably clear, this Court could and would render such judgment as the record called for. But this will not do in cases where there is room for grave doubt as to what view the twelve laymen and the thirteenth may as a body take of the matters in controversy.

For another reason we believe that a new trial should be had, and that is that grounds numbers four and eleven in the motion for a new trial possess some merit. The law forbids the introduction of photographs where there has

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been material change. And with respect to assignment number eleven there is basis for the contention that the Circuit Judge was a little confusing with respect to Black's contributory negligence and with respect to his assumption of risk and the duty of the master.

It results from the foregoing that the judgment of the lower Court dismissing the suit is reversed and the cause remanded for a new trial.

LESLIE CHEEK V. WILLIAM FOX, ADM'R.

Affirmed by the Supreme Court, 1917.

1. DEATH BY WRONGFUL ACT. *Expectancy. Evidence of. Mortality tables not exclusive evidence.*

The expectancy of life of a party for whose wrongful death an action is being waged may be shown by other means than by the mortality tables. For instance, expectancy may be arrived at by health, habits, heredity and other considerations affecting the party's prospects.

2. SAME. *Damages recoverable.*

In an action for wrongful killing of a person the beneficiary may always recover two species of damages where they are shown, namely, those for mental and physical suffering of the deceased and the pecuniary value of the life of the deceased.

3. SAME. *Parent and child. Wrongful killing of infant. Right of father to recover for loss of expected services of the child.*

A father whose infant child has been wrongfully killed may recover the pecuniary value of the life of the child computed with reference to its expectancy, including anticipa-

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tion of service, although there is no evidence that the child had performed or would perform services for the parent.

4. NEGLIGENCE. Automobiles. Right of pedestrian to presume due care upon the part of operator.

A pedestrian rightfully upon the streets or sidewalks of a town or city may act upon the presumption that the driver of an automobile has his machine under reasonable control; and especially such pedestrian may indulge this presumption upon approaching a street crossing toward which an automobile operator is moving.

5. INFANT. Negligence. Presumption as to care.

In the absence of direct evidence it will be presumed that an infant injured in a collision with an automobile was at the time in the exercise of such care as was reasonably to be expected of an infant of the age of the one that was injured.

6. SAME. Negligence of parent in allowing child to go to school.

It is not negligence as a matter of law for a parent to allow his infant child some six or seven years of age to go upon the streets and sidewalks of a city such as Nashville on its way to school in the custody of a sister some two years older; and whether a parent who allows or directs his children to go to school along a much-used thoroughfare of a city on their way to school is a question of fact for the jury, the father in this respect being charged with the duty of exercising reasonable care only.

7. EVIDENCE. Automobile tracks. Speed and time when stop made.

A witness shown to be expert by reason of repeated observations may state that the tracks of an automobile at the point of collision indicate that the machine was skidding or sliding. And such witness may also be interrogated as to the distance at which a machine may be stopped when going at a given speed.

8. AMENDMENTS. At what stage made. After motion for peremptory instructions.

The court may allow the filing of an amended count to a declaration even after motion for peremptory instructions, provided he afford the opposite party opportunity to make defense to any new matter presented by the amendment.

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9. PRACTICE. *Plea of former suit. Voluntary dismissal after plea filed.*

It is not error for the court to strike out a plea of former suit pending when it is disclosed by the record that after the plea was filed the first of two suits brought was voluntarily dismissed.

FROM DAVIDSON COUNTY.

Appeal in error from the First Circuit Court of Davidson County. THOMAS E. MATTHEWS, Judge.

EDWIN A. PRICE for Plaintiff in Error.

W. H. WASHINGTON for Defendant in Error.

MR. JUSTICE MOORE delivered the opinion of the Court.

THIS action was instituted in the Circuit Court of Davidson County to recover a judgment for the negligent injury, resulting in the death of Margaret Fox, plaintiff's minor child, who was struck and run over by defendant's automobile which was operated by his chauffeur. This occurred on the 3rd of June, 1914, on the south side of McGavock Street, where an alley crosses it in the City of Nashville. The trial resulted in a verdict and judgment for plaintiff in the sum of \$12,500, and defendant's motion for a new trial being overruled, he has brought the case to this Court and seeks a reversal of the judgment against him. He has filed sixteen assignments of error, but we do not intend to deal with these assignments in the order made.

The original declaration simply averred that defendant's chauffeur in charge of his car carelessly and negligently and by wilful and wanton negligence ran said auto-

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mobile over plaintiff's little girl and so injured her that, after lingering in great agony for several days, she died, leaving plaintiff as her father and next of kin. This declaration was filed October 13, 1915, and on the 16th of June, 1916, after the proof was closed and motion for a directed verdict had been made by defendant, plaintiff filed an amended declaration setting out certain ordinances of the City of Nashville regulating the speed of automobiles and the use of its streets, and averring a violation of said ordinances.

It is assigned that there is no evidence to support the verdict of the jury, and also that the Court was in error in overruling defendant's motion for a directed verdict, and these assignments will be treated together. After carefully reading the evidence offered by plaintiff below and also after carefully reading brief of learned counsel for appellant, setting out his insistence in respect to the evidence offered at the trial, we have easily reached the conclusion that there is abundant evidence to sustain the verdict and that the Court would have been in error to have sustained the motion for peremptory instructions. The facts, briefly stated, are these: Defendant owned a large automobile, which was operated by a colored chauffeur. His business house is on Demonbreun Street, only a short distance from the place where the injury occurred. On the morning of June 3, 1914, he rode in his car to his place of business and while on the way his chauffeur asked permission to permit another colored boy to ride in the car with them. This was granted, and the boy took his seat in the rear portion of the car, while defendant rode on the front seat by the side of the chauffeur. When he reached his place of business and after getting out of the car, he instructed Drake to take the car to his home, where his wife wanted him for some purpose.

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McGavock Street, where the injury occurred, extends east and west, crossing Eighth, Ninth and Tenth Avenues, down to the terminal station. Midway between Ninth and Tenth Avenues there is an alley which runs north and south and begins at Demonbreun Street, extending across McGavock and to Broad Street, which is the next street to McGavock on the north, Demonbreun being the first street south of McGavock. This alley is seventeen feet wide between McGavock and Demonbreun Streets, and supposed to be that wide on to Broad Street. The distance between Eighth and Ninth Avenues and Ninth and Tenth Avenues is not great, but just how far these streets are apart does not appear. On the southwest corner of McGavock and Ninth Avenue there is a large residence fronting on Ninth Avenue, which extends west into the concrete pavement on the south side of McGavock Street, nearly to the alley in question. In the rear of this residence there is a picket fence back to what seems to be some stables, which are on the corner of McGavock Street and the alley. The concrete pavement is eight or nine feet wide and extends up to this fence and to the front of the stables which open on McGavock Street. On the west side of the alley and south of McGavock Street there is a small residence with a small front yard extending out to the pavement. The stables mentioned as being on the corner of the alley and McGavock extend south on the east side of the alley quite a distance, and, in fact, from these stables still south to Demonbreun Street on the east side of the alley there are continuous connected buildings, so that anyone coming from Demonbreun Street over the alley to McGavock Street cannot see east of the alley and cannot see that part of McGavock Street east of the alley until right near its mouth. In other words, it is what is termed a blind alley. This section of the city is

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filled up with residences and has no business houses on it. The terminal station is west of the alley at Tenth Avenue, which extends north and south, and immediately east of the station. Down in that section and around the terminal station there is a great deal of traffic. Many hacks, wagons, trucks and other business vehicles are constantly operated there. On McGavock Street in the neighborhood of this alley not many business vehicles are operated, though at times there are some such conveyances used in delivering groceries and other things to families living in that neighborhood. That particular section seems to be rather a quiet part of the city, being used for residence purposes.

On the morning this unfortunate tragedy occurred three of plaintiff's children, whose mother had died in March preceding, started to school from their home on Seventh Avenue. The oldest was nine years old, the next eight years, and the child that was run over by the automobile was not quite six years old. When they reached a point on Eighth Avenue about where the intersection of Demonbreun Street is, they met three other children whose name was Nolan, the oldest being about eleven years old and the other two younger. They were attending St. Joseph's School, located on Church Street, on the corner of Twelfth Avenue and Hinds, and near the Church Street viaduct. The route taken by them to go to the schoolhouse after they met with the Nolan children was up the street to McGavock, thence west on the pavement on the south side thereof, intending to go to Tenth Avenue, thence north to Broad Street, and thence west to Twelfth Avenue, and thence north to the school building. They could have gone north on Eighth Avenue to Broad, and thence west to Twelfth Avenue, but plaintiff says he instructed them to go over McGavock Street and Tenth Avenue to

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Broad, though his oldest daughter testified that he did not so instruct her and that she chose the route over McGavock and Tenth Avenue herself. After plaintiff's little girls met the Nolan children they walked to McGavock Street and thence west towards this alley. The little girl, Margaret, after reaching McGavock Street, had been running before reaching the alley and her elder sister, Nellie, was trying to keep up with her so as to look after and take care of and protect her from any danger. Both of them had stopped running before they reached the alley, and the children were in about this position just before the car ran over little Margaret: She was in front of Nellie some ten or fifteen feet, and the Nolan children and Mary were in the rear of Nellie, all of them being on the pavement on the south side of the street. When Margaret reached the alley she started across it and had gone twelve or thirteen feet, and at that time Nellie had reached its edge and was in the act of stepping from the pavement into the alley to cross it, when defendant's automobile, operated by a negro chauffeur in the front seat, with the other negro boy in the rear seat, suddenly came out of the alley from the south, when the front end of the car struck little Margaret, knocked her down and then ran over her. The chauffeur, just after he struck the child, turned the car suddenly to the left, ran it across the edge of the pavement just west of the alley and stopped it just as the rear passed over the north edge of the pavement. The little girl was knocked down, or was lying in the gutter just where the alley and the street come together, about four or five feet in a northeastern direction from the northeast corner of the lot just west of the alley. Her head was lying towards the north after she fell. When the child was knocked down and ran over Nellie and the other children immediately screamed, and this attracted

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the attention of several persons near-by, who at once ran to her and when they reached her they found her face covered with blood and blood oozing out of her eyes, nose, mouth and ears, and in an awful and deplorable condition. Nellie at once ran home to inform her father and grandmother of what had occurred. The child was taken up, put in an electric truck and taken to a hospital, and when the father learned of the awful accident that had befallen her, he and the grandmother started to the scene of the accident, and finding she had been taken to a hospital, they followed immediately thereto. The child was then taken to Dr. Briggs' Infirmary, where she remained for a week, suffering the most excruciating and intense pain and agony. She was found to have bruises all over her body, her skull fractured, a bad cut about her left eye and she finally went blind before her death. The pain the child suffered during her life after the injury was so intense and excruciating that, though she was in a room on the second floor of the hospital, her groans could be heard on the street below. After lingering in this manner for a week, death relieved her of her pain and misery.

Immediately after the negro chauffeur ran his car over the child he left it and started on a run in the direction of Mr. Cheek's business house. A man near-by riding in a buggy and who was attracted to the scene by the screams of the children, saw the negro start on a dead run and immediately started after and arrested him and turned him over to the police. The negro claimed that he was going to tell Mr. Cheek of what had happened, but to the writer this is doubtful, for he is impressed with the belief that it was another case of the guilty fleeing when no man pursued and that the negro ran because of his conscious guilt of criminal negligence and sought safety in flight.

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The traffic laws of the City of Nashville require those operating automobiles or other vehicles, before turning into a street to sound their horn or some note of warning to persons on the street that they desire to enter, so that such persons will know of their presence and take care not to be run over or otherwise injured by such vehicles. The little girl, Nellie, and her sister, Mary, who were present at the time, as well as the little boy, James Nolan, who was also along, testified positively that this chauffeur did not sound his horn or make any noise warning them of his approach from the alley into McGavock Street. Another girl who was in a house immediately west of the alley and south of McGavock Street and within a few feet of the alley, the windows of whose room were open, saw the car as it passed going north to McGavock Street, and she also testified that no horn was sounded by the chauffeur or any other warning given of his approach to the alley. Other people in the neighborhood likewise testified that they did not hear any such noise, and that they could and probably would have heard it had such alarm been given. The negro chauffeur and the colored boy in the car with him testified that when within about sixty feet of McGavock Street he saw some school children pass in front of the alley, when he slowed down the car and sounded the horn twice, and when within fifteen or twenty feet of the street he stopped and sounded the horn three times, and, seeing no one in front of him, started his car forward and the first he saw of the little girl she ran into the right fender of the car, striking it some two or three feet from the front thereof. Why he did not see her before she struck the fender he does not explain. He was on the right side of the car in front and there can be no reason why he did not see the child before she ran into the fender, although he testified he did

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not. The jury evidently did not believe the testimony of these two negroes, and neither do we credit their statements.

On the east side of this alley near Demonbreun Street there is a garage in which some men were at work. Defendant Chek testified that his car did not make much noise when running, but when it passed this garage it made so much noise as to attract the attention of the men at work therein, and caused them to make a remark about its running. We are not familiar with terms used about the operation of automobiles, but one of these men said the car as it passed the garage was in second gear. He explained that a car is put in first gear when started, and so long as it remains in first gear it runs slowly, but when it was desired to increase the speed of the car it was then put in second gear, when it would run faster, and when it was put in third gear it then made its best speed. This witness said the usual method was to put it in first gear when the machine is started, then if it was desired to speed up the car it was next placed in second gear, and then shortly it was put in third gear, when it made its best speed.

The jury evidently believed, and we think rightfully, that after these negroes got out of sight of Mr. Cheek they put the car first in second gear to increase its speed, and, before going far in the alley, then put it in third gear, and were recklessly and with gross negligence speeding through this alley out into McGavock Street without stopping or blowing a warning sound, and in utter disregard and with criminal negligence of the safety of anyone on the pavement who was about to cross the mouth of the alley to the pavement on the west side. If such were the conclusions which the jury reached, we think they were well warranted in their deductions from the facts deposed

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to on the trial of this cause. That this chauffeur was guilty of actionable negligence and a gross violation of the traffic ordinances of Nashville we think there can be no reasonable controversy. In fact, a charge of criminal negligence might well have been sustained against him. The evidence to sustain this verdict is abundant, and makes as clear a case of almost wilful, wanton negligence as we have found in any record which we have investigated. The first and second assignments are overruled.

Under the third assignment a certain part of the charge given to the jury is assigned as error. We do not think it necessary to copy in the opinion these excerpts from the charge. It would make the opinion too long to do so. There is no error in that part of the charge copied under assignment three. It is stated in the brief that the effect of this portion of the charge was to direct the attention of the jury to the obstructions along the east side of the alley that obscured the view of the chauffeur and to emphasize his duty to increase his care and attention, while at the same time the Court did not also call the jury's attention to the obstructions shutting off the view of the children on the pavement of approaching vehicles as they walked towards the alley and call the jury's attention to the corresponding increase of care on their part as they walked towards the alley. The Court fully instructed the jury as to the duty of this child to exercise ordinary care in the use of the pavements and streets so as to avoid being injured by approaching automobiles or other vehicles, and if he failed to fully instruct the jury in this regard it was the duty of counsel for defendant to ask for additional instructions. Counsel did ask that the Court instruct the jury "That the fact that a car is running in second gear does not of itself indicate any rate of speed or that the car is running fast or slow," which

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the trial judge declined to give. Whether running in second gear indicated any speed at all or whether it indicated the car was running fast or slow was not a question of law but of fact for the jury to pass upon. Even if mistaken in this it was not such a material error as to entitle appellant to a reversal for failure to give this instruction.

Under the fourth assignment exceptions are taken to the charge of the Court in regard to the measure of damages and the proof to be considered in fixing such damages. After the Court told the jury about the two classes of damages recoverable in this action, the first being for injury to the deceased herself and the second, the damages suffered by her next of kin, he stated that the first embraced damages for mental and physical suffering of the deceased, and the second, the pecuniary value of the life of the deceased to her next of kin, that is, her father. The latter damages, the Court said, are, "To be determined upon the consideration of her expectancy of life, her age and condition of health and strength, all modified, however, by the fact that the expectancy of life is at most only a probability based upon experience." It is insisted there is no proof in this case to sustain this portion of the charge, or, in other words, there is no proof as to the life expectancy of this little girl except that she was six years old and in good health, and, consequently, it was error in the Court to mention her expectancy of life in this part of the charge.

The life tables used by life insurance companies showing the expectancy of the life of a person at a certain age, are competent evidence of the length of time a person is expected to live after a certain age, when that person is in good health and free from any causes likely to produce an early death. We do not understand such tables

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are the only evidence of the expectancy of life. There may be and always is other evidence that can be offered which will reasonably indicate that the deceased would probably live a great many years. The proof in this case showed this little girl to be nearly six years old, in perfect health, strong, robust and free from any defects or blemishes of any character. It does not take the tables of life expectancy to indicate that such child would probably live a great many years, and it may be longer than the life expectancy tables would indicate.

In *Railway Co. v. Carter*, 129 Tenn., 459, in discussing this question, Mr. Justice Green says: "The damages recoverable in these actions are, first, such as are suffered by the beneficiary by reason of the loss of the deceased, and, second, such as the deceased himself would have been entitled to recover had he survived." It was held in that case that the widow's claim for damages under the statute is not limited to such as she may have sustained as a result of her husband's death, but that she might recover for the injury done the deceased. It was also decided that she might recover substantial damages without any special showing of pecuniary loss to herself. Under the statute the widow or next of kin is entitled to include in his or her recovery all damages he could have recovered, or in other words, the statute was not only enacted for the benefit of designated beneficiaries, but is a survival statute as well.

It is argued that there is no proof, and in fact there could be no proof of the earning capacity of this little child, and for that reason there is no proof that its father lost any value by reason of its death. It is true there is an absence of this character of proof, but the father certainly had a reasonable expectation of realizing some money value from the continuation of the life of his child.

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The judges in passing upon such questions all know that most children, the vast majority of them, are beneficial in a money sense to their parents, and when the life of such a child is lost by the negligent acts of another, the parent is deprived of a money value for which he or she is entitled to be compensated under the statute. While for a number of years after this child reached the age of six years it would probably be an expense to its parents, yet everyone knows a period in life is reached when the child becomes a profitable and in many instances a good paying asset to its parent, helpful and useful in many ways. We do not think there was any error in this part of the Court's charge to the jury. He instructed it that it must take into consideration the health and strength and life expectancy of the little girl, but consider at that same time that the expectation of life was a mere probability, and after weighing all these facts he told the jury they should assess such amount of damages as would be sufficient to compensate for the loss of the life of the child.

After the Court had instructed the jury as shown in this excerpt counsel sought to confine the jury to a consideration of damages recoverable for the pain and suffering of the deceased, and so asked the Court to charge the jury, which he refused to do, and in such refusal we think there was no error. This request was based upon the absence of any proof in the case of the expectancy or value of life of the little girl, and as we have said, the value of her life was not dependent upon proof of her life expectancy as shown by the life tables. That fact might be shown in other ways and by other proof, though perhaps not quite so certainly as by the introduction of the life tables. Even proof of the life expectancy by the life tables does not absolutely fix the length of time a person will live. It only indicates a person will live that

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length of time. In all such cases it is proper for the jury to consider not only the life expectancy of the deceased, when there is proof of such, but also the age, habits, health and constitution of the person should be considered in estimating the life expectancy.

In Tiffany on Death by Wrongful Act, Section 164, it is said, "The damages to the next of kin are necessarily indefinite, prospective and contingent. They cannot be proved to within an approach to accuracy, and yet they are to be estimated and awarded for the statute has so commanded. But even in such case there is, and must be, some basis in the proof for the estimate. The age and sex, the general health and intelligence of the person killed; the situation and condition of the survivors and their relation to the deceased; these elements furnish some basis for judgment. That it is slender and inadequate is true, but it is all that is possible, and, while that should be given, more cannot be required. Upon that basis and from such proof the jury must judge."

It would seem from this statement of the rule by Mr. Tiffany that the Court did not go far enough in calling the jury's attention to such facts it might consider in estimating the compensation plaintiff was entitled to recover for the loss of his child, but without adding anything further it is sufficient to say that we do not think there was any error in this part of his charge.

Under the fifth assignment it is insisted the Court was in error in telling the jury that if the chauffeur of defendant neglected and failed to obey the city traffic ordinances and that such failure was the direct and proximate cause of the accident, while the deceased and her father were without fault and negligence, in such case such violation of the ordinances by the chauffeur was negligence in and of itself as a matter of law, and in that case

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their verdict should be for the plaintiff. It is practically conceded that the violation of a municipal ordinance when the direct and proximate cause of the injury is in and of itself negligence *per se*; yet it is argued that the above instruction was error, but upon what grounds it can be insisted that such was erroneous we are unable to understand.

It was held in the case of *Railroad v. Martin*, 113 Tenn., 266, that the violation of a city ordinance, if the proximate cause of the injury for which suit was brought, was negligence *per se*, and the case of *Queen v. Coal Co.*, 95 Tenn., 458, and the unreported case of *Williford v. Memphis Street Railway Co.*, decided at the April term, 1903, were cited in support of the rule so announced. In *Railroad v. Haynes*, 112 Tenn., 718, it was there likewise held that the violation of a city ordinance, if the proximate cause of the injury, was negligence *per se*. So that there can be no doubt of the soundness and correctness of the rule announced by the trial judge in the excerpt from his charge copied in the brief.

Under assignment No. 6 a request offered by defendant to be given to the jury and refused by the trial judge is copied, and his refusal is assigned as error. Without going into this request fully it is sufficient to say that the points embraced in it are fully set out and given to the jury in the main charge. It is said that while the Court had previously instructed the jury that the presence of obstructions on the east side of the alley imposed a higher degree of care on defendant's chauffeur on account of the greater danger, yet he had failed to impose a corresponding obligation upon the plaintiff, and this request was offered to correct such omission in the general charge. We do not agree with this interpretation of the general charge. Under the facts of this particular case we think the Court went

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to the very verge of the law in stating the duty resting upon this child as it approached and started to cross the mouth of this alley. It must not be forgotten that this particular part of the alley was in fact a part of the pavement to the south side of McGavock Street. To go from 9th to 10th Avenue over the pavement it was absolutely necessary that the child cross the mouth of this alley, or do what would be more objectionable, walk out into the street. When it reached the alley, on account of the obstructions on the east side of it, the child could not see far down the alley in a southerly direction, and it is insisted that plaintiff should have offered proof to show that it exercised ordinary care, such care as was commensurate with the dangerous situation before it started across the mouth of the alley, that is such ordinary care as a child of its age and intelligence would exercise if similarly situated, or in a like situation as that in which this child was placed. Of course this child was capable of exercising some degree of care, but the care expected of a child of its age and intelligence must necessarily be very slight. But whatever care it was capable of exercising, it was its duty to exercise that care and caution before attempting to cross the alley. An older person under the same circumstances and similarly situated would be expected to and would exercise more care and caution than this child could or did. We would hardly expect one of its age to stop when it reached the edge of the alley and look south into the alley to see if any vehicle was approaching. The writer thinks that would be expecting more care and caution of this child than its age and intelligence would justify us in looking for. But whatever care and caution the law imposes upon it, considering its age, its experience on pavements of the city and its intelligence, in the absence of any proof on the subject, the law presumes it exercised that care and caution

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before going upon the mouth of the alley to cross to the pavement beyond.

In the case of *Tennessee Railroad Co. v. Herb*, 134 Tenn., 397, it was there again held by the Supreme Court of this State that if the plaintiff's contributory negligence does not appear from the proof offered by him, the burden of showing its existence rests upon the defendant, citing *Stewart v. Nashville*, 96 Tenn., 50, and *Burk v. Street Railway*, 102 Tenn., 409.

Plaintiff's proof in this case wholly fails to show, or to remotely indicate in the judgment of this member of the Court, that this little girl was guilty of the slightest degree of contributory negligence as she walked across the mouth of this alley. While the evidence indicates that she had been running along on the pavement, the proof clearly demonstrates by the testimony of at least two witnesses present at the time, that she had stopped running before reaching the alley, and that she was walking across it when hit and run over by this automobile. One of the negroes in the car testified she was walking fast, but all the other evidence tends to show she simply was walking across from one pavement to the other west of the alley. The evidence of defendant, while the burden of proof of showing contributory negligence was on him, does not prove any negligence on the part of this child.

In *Railroad Co. v. Herb*, *supra*, the Court said, "There is a presumption arising out of the instincts of self-preservation that a decedent was in the exercise of ordinary care when suddenly injured, prevailing until overcome by competent evidence, and which may prevail where there are no witnesses of or any direct testimony as to his conduct." Citing a number of cases including *Travelers' Insurance Co. v. McConkey*, 127 U. S., 661.

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If this child is charged with the duty of exercising ordinary care while crossing this alley, the presumption arising out of its instincts of self-preservation is that it was in the exercise of such care, and in the absence of proof on this point by the plaintiff that presumption stands as evidence establishing ordinary care, and it takes proof on the part of the defendant to overcome this presumption. While it would have perhaps been the duty of an adult before attempting to cross the mouth of the alley from one pavement to the other, to stop, look and listen for an approaching vehicle, yet it is now well settled in this State that such duty is not absolute and positive, but the question is to be left to the jury to determine under all the facts and circumstances surrounding the transaction at the time if the injured person should have stopped, looked and listened. While this is true in regard to an adult, the rule cannot and should not be that stringent in reference to a little girl not quite six years old. Still, it might be left to the jury to say whether in such a situation she should have exercised that care and caution to the extent that one of her age and intelligence would have exercised.

Under the 7th assignment it is insisted the Court should have given to the jury defendant's request No. 8, to the effect that if this child required the care and oversight of some older person to protect her, and that such care and oversight was not exercised by her father, but left to the direction and control of her sister Nellie, a girl of nine years of age, "To go into a dangerous or perilous situation on her road to school when there were other ways free from danger and peril which she might have pursued in safety, and that such want of reasonable care on the part of her father directly contributed to her injury, then plaintiff cannot recover, and your verdict should be for the defendant." The vice in this request is in assuming that the

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child was permitted under the direction of her sister Nellie to go into a dangerous or perilous situation on her road to school, when the proof wholly fails to show that the place where she was injured was either perilous or dangerous, and it certainly was not, except when used in the reckless, careless manner it was by this chauffeur. This record indicates that McGavock Street from 8th to 10th Avenue and thence to Broad Street, was about as safe and free from danger and peril, if not more so, than the route up 8th Avenue to Broad and thence west on Broad to the terminal station. It is common knowledge which this Court may know and possess, and which it does know and possess, that Broad Street from 8th Avenue west to the terminal station is about as much if not more used than any business street in Nashville, while McGavock Street from 8th to 10th Avenue is a residence street, and but little used for commercial purposes. The principle embraced in this request was also fully covered in the Court's general charge, though not in the exact language used in the request, and it is not necessary that it should be, and, therefore, there was no error in refusing to charge the request.

It is assigned as error that the Court refused to charge request No. 7, in regard to the duty of the parent to protect a child of tender years, when such child is not of such age and experience as to be able to take care of itself. The Court gave the instructions embodied in this request, but said, "Given with this addition, to-wit: The father, William Fox, was bound in law not to exercise the highest degree of care, but only ordinary care as defined in this charge." This addition to the request is not happily worded, but what the Court intended to say was that the father was not bound in law to exercise the highest degree of care, but was only required to exercise ordinary care as had already

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been stated in the general charge, and such is the law as we understand it.

It is said the main charge omits reference to the unusual perils or dangers of the situation in which the child had been placed, and for that reason the principle embodied in request No. 7 was not contained in his general charge. We do not think the record shows that the father had put his child in a place of unusual peril or danger. The record indicates to us that the pavement over which the child was traveling to school was about as safe if not safer than any other pavement that could have been selected for it to use in going to school. It is said that the addenda to the effect that the father was only bound to exercise ordinary care, nullified or destroyed the request embodied in No. 7. We do not think so. The Court intended to tell the jury that when the peril and danger increased, then the care exercised by the father should correspondingly increase, but even in such case his care would only be ordinary care, and not the highest degree of care. As the Court told the jury in a part of his charge, where the danger is greater the care should be greater; that is, what is ordinary care in one case would not be ordinary care in another case. So that whatever may be the danger or peril, whether great or small, the care to be exercised by the father is simply ordinary care, not the highest degree of care nor the utmost care nor extraordinary care, but simply ordinary care.

Under assignment No. 8 it is insisted the Court should have given in charge defendant's request No. 9, in reference to the degree of care and prudence for safety this child was required to exercise at the time of her injury. It is said in the request, "Unless the plaintiff in this case has proven by a preponderance of the evidence that the child, Margaret Fox, did exercise such degree of care for

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her safety at the time of her injury, plaintiff cannot recover." We have cited the case of *Railway Co. v. Herb*, to show the law presumes the exercise of ordinary care in the absence of any proof on the question. The instincts of self-preservation will cause even a child to exercise ordinary care for its safety, and where there is no proof, as there is none in this case, of a failure to exercise such care, there is a presumption that such care was exercised and this presumption becomes conclusive when the defendant offers no evidence of a want of the exercise of such care by the injured child. In addition to the rule as declared in the *Herb* case, the Court had already covered this question in previous requests presented by the defendant.

The error complained of under assignment No. 9 consists in the refusal of the Court to charge defendant's request No. 13. This request had already been covered and included in defendant's special requests Nos. 4 and 5, which substantially embraced the same matter covered by this request. We have also disposed of the question raised by this request in a former part of this opinion, and deem it unnecessary to go over the same question again. The cases cited by learned counsel in the brief to sustain the alleged error insisted upon, bear no sort of resemblance to the facts of this case. In all of them, and we have examined each carefully, it appears the injured party was out in the middle of the street where it was run against or upon or over by some vehicle and hurt, while not immediately under the control of the parents. We have no such case as that now before us. This little girl was on her way to school in charge of and under the control and direction of her nine-year-old sister, who from her testimony given on the trial clearly and unmistakably indicated that she was a bright, quick, smart, intelligent child, well capable of managing, handling and controlling her sister of six

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years. Little Nellie selected as her route to school a street which the proof demonstrates was as safe as almost any residence street in Nashville. When they reached the mouth of the alley none of them were running, but each was walking, and the child seeing no obstruction in her way, and finding the alley unoccupied, had the legal right to go upon and use it in crossing to the opposite side of the pavement. She was under no obligation to stop and wait for this automobile to approach the crossing and pass it. She was authorized to proceed upon her way, and if she had seen the automobile coming from the south toward the crossing she was then using, she would have had the right to assume that the chauffeur had it in reasonable control and was then exercising ordinary care as he should have been, and would avoid colliding with her, and as stated in *Transit Co. v. Seigrist*, 96 Tenn., 122, "No mistake that she might have made in that rightful assumption could be charged to her as negligence, unless the lack of such control and care on the part of the chauffeur controlling the automobile was apparent to her at the time." She had, in going across the alley, the same right to use it and to assume that she would not be wrongfully injured in its use, that a grown person had to indulge in such assumption, and if she made a mistake such rightful assumption could not be charged to her as negligence. It is not like the case where a child or an adult leaves the pavement and walks out into the street, or is attempting to cross a street and is injured when away from the regular street crossings. This child was going along the pavement and across an alley that she had as much right to use as this negro chauffeur in his master's magnificent automobile, or as any other citizen of Nashville had in that place.

Under the 10th assignment it is insisted the Court erred in permitting plaintiff's attorney to ask a certain question

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of one of his witnesses, which question is as follows: "Do you know of any reason why if that horn had sounded in the automobile that you could not have heard it?" This question was objected to, and the grounds of such objection do not satisfactorily appear. The witness had been repeatedly cross-examined by defendant's counsel about her statement that the horn was not sounded, and a strong effort was made to show that it might have been sounded and she not have heard it. This question was intended to show by her that nothing happened or she heard nothing or that there were no noises in her neighborhood or anything to have prevented her from hearing it, and while the question is rather awkwardly asked, yet we think it was competent. It is said the Court made a statement during the colloquy between counsel in regard to the competency of this question which he should not have made. We are constrained to disagree with learned counsel in regard to what the Court said, and even if the remark was improper it was harmless, and would not be reversible error.

Under assignment No. 11 it is urged that the Court was in error in permitting the witness Wilkerson to state the kind of tracks or marks he found near where this injury occurred and in the alley some feet south of the crossing. This witness showed himself to be an expert and familiar with automobiles. He testified that he was familiar with the kind of a track the wheels would make when slipping and in rolling or turning, and after so stating he was then asked if he saw such track or mark, that is a slick, dark mark, where a wheel slid near the place of this accident, and he answered that he did about four hours after it occurred. Objections were made to this upon the ground that the witness was not able to say whether the mark or track he mentioned was made by defendant's car wheel or not. The objections were overruled and the question an-

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swered. We think there was no error in this. The grounds of the objections would go to the weight and not to the competency of this testimony. Then counsel could have weakened it very much by a somewhat vigorous cross-examination.

It is said the Court was in error in citing the celebrated case of *Holder v. State*, from Obion County, decided by the Supreme Court six or eight years ago at Jackson. In that case a negro man testified for the State that the night Mr. Holder was killed he heard a horse galloping along the road near his house and recognized the sound of the horse's feet as a horse that Lee Holder, the accused, usually rode in a gallop along the highway. The Court simply cited this case as his authority for the ruling he made, and we fail to see any impropriety in doing so.

Under the 12th assignment it is insisted the Court was in error in permitting a certain question to be asked plaintiff's witness, Mr. Harrison, which was as follows: "Now, if a car is going four or five miles an hour, and is under control, suppose a little girl were to appear in sight in front of the automobile, how soon could that automobile,—within what space could it be stopped?" Counsel insists this was an incompetent question. Mr. Harrison had shown himself to be an expert in operating and handling an automobile, and nothing is more common than for an expert to state within what distance a long train of cars, or a short train of cars, or even an engine can be stopped by the engineer in charge of it. We can see no error in the admission of this testimony. It is said in the brief that it did not appear from the testimony of any witness that a little girl appeared "in front of the automobile". This was not given as a ground of objection to the question at the time the matter was before the trial judge and under well-settled rules it could not be urged in this Court. But,

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notwithstanding what counsel says, little Nellie Fox did testify that the child was in front of the car and it ran over her.

Under assignment No. 14 it is insisted the Court erred in not permitting defendant to state that he subsequently learned who picked the little girl up and took her to the hospital; that he afterwards learned the name of such man. That fact could not possibly have thrown any light upon the question being tried, and it was certainly not error to sustain the objection to it.

Under the 15th assignment it is insisted that the trial judge erred in permitting plaintiff to amend his declaration by filing a second count after the motion for peremptory instructions had been made by defendant. The record shows that plaintiff amended his declaration in several particulars, and after motion for a directed verdict he asked and obtained leave to file a second count setting out and declaring on the different traffic ordinances in the city of Nashville. Defendant objected to these amendments, but the Court allowed them to be made, and after they were made defendant filed a plea of not guilty and the additional plea of negligence on the part of the plaintiff, the father of the little girl. It appears that shortly after this injury a suit had been brought in the name of the little girl by her father as next friend, and after these amendments were made and pleas filed as stated, defendant then suggested that the suit of Margaret Fox by her next friend had not been dismissed and was still pending. Thereupon plaintiff's attorney stated he thought it had been dismissed, but if it had not, it would be dismissed, and when the clerk reported that it was still pending in Court, plaintiff, as next friend, moved to dismiss it, and this motion was sustained by the Court and that suit dismissed. Thereupon defendant moved to file a plea in

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abatement of former suit pending in regard to the case of Margaret Fox by her next friend, and the Court overruled this motion. How a plea of former suit could affect a case already dismissed and out of Court at the time the plea is filed, learned counsel does not undertake to explain. The former suit had been dismissed by the next friend who had the legal right to dismiss it, and was not in Court or a pending suit when leave was asked to file a plea in abatement to it. There was no error in refusing leave to file such plea. Then after all this was done the record shows that the defendant again moved on the record as then made up and the issues and proof as it then stood, for a directed verdict in his favor, which was overruled. This motion for a directed verdict, it seems to us, was a waiver of any supposed irregularity in the proceedings now complained of. We do not think there was any error in the action of the Court in these respects.

Finally, under the 16th assignment, it is insisted that the verdict of the jury is excessive and evinces passion, caprice and prejudice on the part of the jury, and in support of this assignment *Railroad v. Overcast*, 3 Hig., 236, is cited, but we fail to see or appreciate the bearing of the quotation copied from that case in the brief upon this assignment. We do not agree with learned counsel that this verdict is excessive. We have a case where a stout, perfectly healthy, vigorous child, who was unusually and exceptionally bright and intelligent, so much so that she was going to school before she was six years old, was struck down and almost wantonly killed at about the happiest period of her life. We can hardly conceive of a case where the hand that caused her death could have been more ruthless or cruel than the one that inflicted the fatal injuries upon this child, under the circumstances surrounding her death. It was clearly a case, as we view these facts,

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for exemplary damages. To our mind this record unmistakably points to these conclusions; That these two negroes being in this magnificent car, after getting beyond the vision of its owner started to make a show of themselves and to race with rapidity down this alley into McGavock Street with no thought of pedestrians on the pavement or at the mouth of the alley, and not only not looking for such, but apparently not caring whether they encountered them or not. No doubt the chauffeur was looking back talking to his friend in the rear seat just before and at the time this child was struck and run over. When her little sister and those near reached her side her face was covered with blood, there were gashes about her eyes, her skull was fractured, her little body was covered with bruises, and in fact her very appearance indicated her immediate death, or death in a few days. Blood was coming from her eyes, her ears, her nose and her mouth, and flowed and remained upon the street where she fell, as a ghastly evidence of the outrageous manner of her death, for days thereafter. Her clothes were torn almost into shreds. After lying there for a short time, kind but strange hands took her and carried her to the hospital, where her father followed. He found her in the same condition as she was when she was taken from the place of her injury. Blood all over her face, coming from her eyes, ears and nose and mouth and flowing down upon the floor of the room. Her agony and pain were intense, as we would know without proof to that effect. She was then taken to Dr. Briggs' infirmary, and there during the days that followed her misery may well be imagined but cannot be expressed. So pitiful, painful and loud were her groans of agony they were heard from the upper story on the street below. What money could compensate for such pain and such agony as this child endured during the remainder of her short life? To say

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nothing of the father's loss, the money value he had in the continuation of her life, it is hard to say just what a jury should give as compensation for her suffering and pain. They are the final arbiters of this question. If we had been a part of the jury, possibly we might have thought \$12,500.00 too much; and yet it is sure there are some members of this Court who would have promptly agreed with this verdict.

Considering her suffering and her father's loss, we do not think the verdict excessive, and it results that the judgment of the lower Court is affirmed.

MEMPHIS WELDING COMPANY v. L. M. LINSON.

Writ of certiorari denied by the Supreme Court, 1917.

1. BAILOR AND BAILEE. *Negligence. Burden of proof.*

The burden is on the bailor who has delivered to a bailee a chattel to be repaired to show that the repairing was negligently done.

2. TENDER IN CASE OF TORT. *Admission of liability.*

The tender of some amount is in a case of tort an admission of liability to some extent and negligence may be inferred from this admission. The rule is different in actions upon contracts, where the tender is an admission of the amount brought forward only.

3. NEGLIGENCE OF BAILEE. *Subletting to an independent contractor no defense where subletting not authorized.*

A party to whom a chattel has been delivered for repairs cannot escape liability for negligence by proving that he delivered the same to an independent contractor in the absence of authority from the owner so to do.

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4. **PRINCIPAL AND AGENT.** *Right of undisclosed principal to recover damages.*

The real owner of a chattel delivered to a workman for repairs may recover for damages thereto although the chattel was delivered to the workman by another than the owner if as a matter of fact the deliverer was the agent, disclosed or undisclosed, of the owner.

5. **BAILEES.** *Rules limiting liability.*

A bailee to whom goods are delivered for repairs cannot limit his liability by a rule not brought home to the depositor nor by a rule that is unreasonable or in contravention of law.

FROM SHELBY COUNTY.

Appealed in error from the Circuit Court of Shelby County, Division No. 4. K. B. KLEWER, Special Judge.

W. B. COWAN for Plaintiff in Error.

W. B. ROSENFELD for Defendant in Error.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

LINSON is the owner of a motorcycle. The Welding Company is a concern engaged in repairing such machines. The motor got out of order. Linson took it to White & Company and requested them to carry it to the Welding Company, with directions to repair it in certain particulars. It seems that there was something wrong with what are called the lugs, and that it was necessary to have them welded on. This is a part of the wheel known as the crank case. White & Company took the instrument to the Welding Company with directions to repair the same. When it was returned there was discovery that certain portions

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had been ruined by being crooked or bent to such an extent as that they had to be thrown away. Linson thereupon instituted this suit to recover damages. The case was tried by a justice of the peace, and was subsequently taken to the Circuit Court, where it was heard by Special Judge Klewer without the intervention of a jury. He pronounced judgment in favor of the plaintiff for \$26.40. The Company has appealed and assigned errors, the substance of which will be noticed.

At the trial before the justice the Welding Company made a tender of \$1.50, and followed this tender up by having the money transmitted to the Court. The tender was not accepted.

The learned judge held that the tender was an admission of liability to some extent, leaving the question of damages as to amount the only issue to be determined. Complaint is made of this. We are of opinion that the Court was correct. Whatever may be said as to the effect of tender in an action upon contract, the authorities are uniform that a tender in an action of tort is a conclusive admission of negligence and of the right to a recovery of some amount, leaving the extent of recovery the only question to be decided. *Palmer v. LaRault*, 21 L. R. A. (N. S.), p. 357, note; *Turner v. Lee*, 98 Tenn., 604.

It is urged that this is an action of tort against a bailee. It is true, as learned counsel says, that the burden is on the plaintiff to show the negligence of the bailee. But this may be supplied by the inferences to be found in the plea of tender. And independently of that there is evidence tending to show lack of care upon the part of the company.

It is said that the negligence was that of Hanson & Company, independent contractors. But there is evidence to the effect that plaintiff through his agents relied

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upon the Welding Company to do the work, and further, that the injury was done in the workshop of the Company; and further, whether it was or not, the Company undertook ineffectually to repair the defect, thus confessing that the work was its own, or laying itself liable for fresh negligence.

It is contended that the Welding Company was liable for \$1.50 only because of a rule which it had that it was responsible for the cost of work only when there was defective performance. This rule was unknown to plaintiff or his agent; it was also contrary to law and public policy, and was unreasonable. Hence, it was not binding.

It is also said that the Welding Company had no contract with Linson. This contention is not well made. White & Company were his agents, and he had the right as an undisclosed principal to adopt their contract. There is no error in the judgment, and it is affirmed with costs.

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PRICE-BASS COMPANY v. MRS. ANNA J. DAWSON.

Writ of certiorari denied by the Supreme Court, 1917.

1. LAW OF THE ROAD. *Meetings at street intersections.*

The statutes known in this state as the law of the road have reference to parties meeting or passing each other, and not to travelers coming together at street intersections. In the latter situations the common law governs.

2. CARRIER AND PASSENGER. *Injuries to the latter by third persons or unforeseeable occurrences.*

While the law exacts of a carrier the highest degree of care for the safety of passengers, the carrier is not liable for injuries inflicted by third persons not under the control of the carrier nor situated where the carrier could restrain the infliction; nor is the carrier liable for injuries inflicted by occurrences not to be anticipated, such as the negligence of a third party where there was nothing to suggest the negligence of that one.

3. SAME. *Jitney bus owners as common carriers.*

The owners of jitney busses or automobiles used in the carrying of passengers are operated with the common law duty of exercising the highest care for the safety of their passengers. But they are not insurers.

4. EVIDENCE. *Offers or statements made by way of compromise. Admissions asserted to be without prejudice.*

The rule sometimes recognized in England that admissions of liability made in an effort to compromise may be proven unless there was an accompanying reservation that they were made without prejudice is not generally accepted in this country, the rule being that such admissions and efforts of compromise are incompetent. This is especially so when there is merely an offer to settle without any admission of fact showing liability.

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5. JURY TRIALS. *Practice. Statements by the court reflecting upon counsel's ability.*

The court should refrain from making any statement imputing ignorance or unskillfulness to the attorney of either party; and the court should refrain from announcing in advance of the full development of the case how he intends to rule upon disputed questions of fact or law.

6. HIGHWAYS. *Notice given party of intention to use a certain portion.*

A party lawfully upon the highway may in advance of actual meeting give a party approaching from an opposite direction at a street crossing notice of his intention to turn in or toward a certain spot and has the right to rely upon the other to govern himself accordingly.

FROM DAVIDSON COUNTY.

Appealed in error from the First Circuit Court of Davidson County. THOMAS E. MATTHEWS, Judge.

NORMAN FARRELL, JR., and HUME & CORNELIUS for Plaintiff in Error.

J. B. DANIEL for Defendant in Error.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

MRS. DAWSON instituted this suit against plaintiff in error, a jitney bus operating company, for damages claimed to have been sustained by her while riding as a passenger in one of their vehicles. Certain of the directors of the company were also sued, but they were eliminated from the litigation at an intermediate stage, and this fact need not be further noted.

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In her original declaration Mrs. Dawson averred that the transfer company as a carrier of passengers had neglected to observe the highest degree of care with respect to the safety of the passengers upon a certain trip, and that in consequence she suffered injuries. In an amended declaration she alleged that in particular the jitney operator had neglected to observe the law of the road as prescribed by Section 1600 *et seq.* of Shannon's Code, in consequence of which there was a collision with another machine.

Upon the trial it was shown or conceded that Mrs. Dawson was being transported as a passenger by the company on a trip going out the Murfreesboro Pike, that upon approaching or reaching an intersection of this road with the Crouchville Turnpike and going south there was a collision with an automobile going north, and that as a result of the collision Mrs. Dawson was shaken up, thrown out and injured in some degree.

The controverted questions in the case were the point at which the collision took place and the manner of impact of the two machines. The verdict and judgment were in favor of Mrs. Dawson. The company excepted and prayed and perfected its appeal, and is here assigning numerous errors, which we shall treat of substantially as they are made.

It is first complained that the lower Court should have required Mrs. Dawson to execute a cost bond. We are of opinion that this assignment has much ground on which it can be based. There was no substantial reason why she should not have been required to make a deposit or some arrangement whereby the cost could have been secured. The fact that her property was non-productive was no sufficient answer.

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In the second complaint is made of the amount of the verdict. We pass this over, as not needing elaboration. In the third assignment it is insisted that the Court was in error in not discharging the jury and ordering a mistrial because plaintiff below was permitted to testify that the president of the company had sought to settle and compromise the case with Mrs. Dawson. The pertinency of this assignment can be best understood by a short recital of the occurrences upon the trial. During the examination of Mrs. Dawson her counsel asked her whether Mr. Price, the president, had been to see her with reference to her case or her injuries. She responded in the affirmative. She was thereupon asked for what purpose Mr. Price had been to see her, or rather what did he want. Her answer was that he wanted to settle the case. Counsel for the defendant below thereupon objected and further insisted that as the minds of the jurors had already been imbued with the idea of a concession of liability, there should be a mistrial. Counsel for Mrs. Dawson thereupon stated to counsel for the company that if objection were made he would withdraw the question. The former persisted in his objection and contended again that a mistrial should be entered. This the Court declined to do, remarking at the time that counsel for plaintiff need not have withdrawn the question, that the Court thought it was entirely proper, that in order to render such testimony inadmissible it was necessary that the declarant assert that his statements or offers of compromise were made without prejudice. The result was that there was no striking of the testimony from the record, and no admonishing of the jury to disregard it, but instead a clear assertion by the Court that the testimony was competent.

This evidence was tantamount to an admission of liability if believed by the jury. This was peculiarly so in

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this case for the reason that the jury were not enlightened as to the right of a party to buy his peace by offering to settle. As for that matter it would be almost imposible for a jury to grasp the distinction between an admission of liability and an offer to compromise just for the purpose of ending litigation. It should also be borne in mind that there was no admission of fact, and that the only inference to be drawn from the testimony was an effort made by Price to terminate the lawsuit by some sort of settlement.

Our first observation is that the answer of Mrs. Dawson was entirely irrelevant and incompetent. Again, the English rule with respect to these offers being made without prejudice does not obtain in this country, and this for the soundest reasons. This doctrine of offers without prejudice probably does have application to admissions of fact, the rule sometimes prohibiting the opposite party from proving facts clearly admitted during negotiations. But when there is no concession of fact, and when there is nothing but a manifest endeavor to settle without litigation, to the end that peace shall be brought about, public policy embodied in the maxim *interest reipublicae ut sit finis litium* comes to the aid of the offerer and makes the *quasi* admission incompetent. Wigmore on Evidence, 1061; Elliott on Evidence, Sec. 230; Jones on Evidence, Sec. 291.

It is a pretty well established rule that when incompetent evidence manifestly prejudicial is admitted a mistrial should be ordered. *Pullman Co. v. Pennock*, 118 Tenn., 569, and cases cited.

It might be that because of the statement of learned counsel for Mrs. Dawson that he withdrew the question and his subsequent course in not referring to it would differentiate this case from those cited, and would not bring this one within the rule announced to such an extent as to

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necessitate reversal. But the undoubted effect of this testimony upon the jury must not be ignored in passing upon other assignments of error. The alleged error was not cured or waived by a subsequent cross-examination of Mrs. Dawson and the bringing to light of the fact that Price had made no offer. Nor can learned counsel for appellant be blamed for cross-examining to ascertain exactly what did transpire. But this occurrence would probably be sufficient to deny appellant a right to reverse upon this ground alone.

The predicate of the fourth assignment of error is a series of remarks made by the Court during the examination of witness Coe. The Court stated, among other things, that he intended to charge the jury that Code, Sec. 1600, had application to the situation, and that it was the duty of Coe, the jitney driver, to have observed this law of the road. These remarks were brought forth by interrogatories as to whether Coe was on the right side of the road, and also as to whether he was complying with the statute when the accident happened. It was the contention of counsel for appellant in the first place that the law of the road did not apply because the collision took place at an intersection, and further that it was for the jury to determine whether Coe was complying with the statute or was violating it or otherwise guilty of negligence. The Court during the colloquy stated that counsel for plaintiff would have the right to ask Coe whether he should not have turned to the right instead of to the left, and also whether Coe was complying with the statute.

It is also insisted that the Court was in error with respect to the following: "Counsel for defendant below asked the witness: 'Did you notice the tracks on that pike that were fixed in the pike and readily observable, which was made by vehicles that passed from the Murfreesboro Pike

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into the Couchville Pike?" The Court: "That is the same thing in another form, and it seems to me it would be impossible for the witness to tell whether they were going in or coming out." Counsel then stated that his object was to show that the driver had not made the turn toward the Couchville Pike at an unreasonable point below the crossing or intersection. The Court continued by stating that he intended to charge Sections 1600-1608, inclusive, winding up by stating that that was the road law of Tennessee. Counsel then asked if he understood his honor to so rule, to which the response was that he had read what he was going to charge the jury; that he thought that he would give counsel the benefit of it. Counsel then made inquiry as to something, but the question was not completed when the Court responded: "There is no use taking my deposition on the subject." Counsel then stated that he wanted to understand his honor's ruling with reference to the evidence. The Court thereupon said: "It is not necessary for you to understand any more than what I have read to you. If you cannot understand that, that is your misfortune."

In this assignment there are at least three meritorious grounds of complaint. The Court should not have decided as a matter of law at that stage that the law of the road absolutely applied, and that no deviation would be tolerated. His judgment upon this point should have been suspended until the whole case was developed. Again, his honor should not have determined that it was impossible for a witness to judge of the direction of automobile tracks upon the road surface. The jurors were just as capable of this—that is, of the weight to be given to the testimony, as was the Court. At all events, defendant was entitled to this testimony without disparagement from the Court.

We also note our disapproval of the responses made by the Court to the inquiries of Mr. Hume. There can be no

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other interpretation than that it was an imputation upon the fitness of Mr. Hume as counsel or at least a lack of comprehension of the issues involved. Its tendency undoubtedly was to prejudice and belittle Mr. Hume in the eyes of the jury. We are therefore of opinion that this fourth assignment of error is well based.

Assignments seven, eight and nine may be considered together. They are based upon alleged errors of the Court in his charge to the jury to the effect that the law of the road as applied to vehicles going in opposite directions applied to the situation, and that if they found that Coe, the driver, left the right side of the turnpike and drove over to the other, and thus collided with the other machine, he would be guilty of breaching the law and guilty of negligence such as would make his employers liable. Also that it was the duty of Coe upon seeing the other vehicle approaching to have kept to the right, and to have done so until he could have turned into the Couchville Pike upon the right side and away from the left curve.

It was and is the contention of learned counsel for plaintiff in error that the point of collision was at the intersection of the Couchville and Murfreesboro Pikes, that Coe's intention was to turn in to the Couchville Pike, and that upon reaching the intersection he threw out his hand and gave Ward, the operator of the other machine, timely notice of his intention to cross into the Couchville Pike, and was in the act of so doing after Ward had himself turned to the left, when Ward veered his machine back toward the right and toward Coe's jitney, thus bringing about the collision.

The greatest conflict in the testimony is with reference to the point at which the collision took place. It is contended by able counsel for Mrs. Dawson that the cars ran together some seventy-five feet or more north of the in-

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tersection of the two pikes. If this as a fact were true, then the law of the road governed the situation, and no error would have been committed had the jury been instructed to return a verdict for plaintiff below. But with equal vehemence and with as much basis, counsel for plaintiff in error contend that the collision took place at or very near the intersection and at a time when the jitney had been turned from the right side of the Murfreesboro Pike in the direction and in the proper position to enter the other thoroughfare. It is, of course, not for us to determine this disputed fact; nor did the lower Court have the right to assume that the collision did not take place at the intersection of the two roads. Plaintiff in error having some evidence tending to show that the contact was at the intersection, it was entitled to instructions embodying its theory. It is true that plaintiff below was justified in demanding submission of her theory that the collision took place quite a distance away from the street junction. But this did not give her the right to an absolute instruction that the law of the road applied, in view of much controversy as to the exact point of collision. Hence, the error of the learned judge in his emphatic instructions that the law of the road governed. For it cannot be doubted that the whole of the charge of the Court was upon the assumption that the collision took place beyond the intersection and at a point where the law of the road governed the situation.

Whether the driver of the jitney had reached the point at which he intended to and had the right to enter the Couchville Pike was a disputed question, with much evidence to the effect that he had gotten to the place and was in the act of going across to the other road when the collision took place. If so, then plaintiff in error was entitled to an instruction upon common law negligence un-

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mixed with any specific statutory rules such as are laid down for parties meeting and going strictly in opposite directions. If this was a meeting at an intersection, the law of the road was not the rule of conduct. It is true that plaintiff in error was bound to exercise the highest degree of care for the safety of its passengers, but this rule did not require absolute observance of the law of the road made with peculiar reference to travelers in opposite directions. It may be true that the driver should have kept to the right. Our point is that he was not absolutely bound to do so as stated by the learned trial judge, but that the carrier might in the exercise of the highest degree of prudence consistent with the practical operation of the jitney have turned into the Couchville Pike by crossing to the left of the Murfreesboro Pike just before reaching the former highway. As we understand the authorities, the law of the road does not obtain when persons meet at street intersections. See 13 Rul. Case Law, pp. 278; *Molin v. Wark*, 41 L. R. A. (N. S.), 346, note, also page 350. In fact, this construction is apparent from the wording of our own Act, Code Section 1600, which is:

“Every driver or person having charge of any vehicle on any turnpike or macadamized road, on meeting and passing another vehicle shall give one-half of the road by turning to the right, so as not to interfere in passing.”

The next section has reference to persons going in the same direction, clearly implying that the preceding section has reference to those going in opposite directions. The authorities are almost uniform that when it comes to the matter of turning in to another street, or as for that matter, turning to the left side for a lawful purpose, the common law and not specific statutory regulations govern the situation: *Young v. Cowden*, 98 Tenn., 577.

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It is urged that this contention of plaintiff in error, namely, that the common law governed if the parties met at the intersection, was substantially given by the Court. It is true that in one part of the charge, particularly in some special requests, he did set forth this thought to some extent. But his instructions otherwise were so emphatic as to leave no room for doubt that the jury were told that the law of the road was the rule by which they were to test the conduct of the driver of the jitney bus.

The eighth assignment of error is predicated upon this instruction to the jury: "The driver of the jitney had no right to command Ward by signal or otherwise to disregard, to disobey or to violate the statute in such case made and provided known as the law of the road. And if such signal was given by Coe and seen by Ward, no duty rested upon Ward to obey it or to give heed to it. On the contrary, it was the duty of each driver to obey the law as it is written."

Our first comment is that while the first clause of the judge's instruction under criticism stated an abstract rule of law, it was calculated to misguide the jury in their deliberations. It is true that the jitney driver had no right to signal Ward to disobey the law. But he certainly had the right to notify Ward of his intention of turning in to the Couchville Pike, and if he did so, it cannot be said as a matter of law that Ward should disobey or disregard such signal. If, as a fact, Coe was about to go into the Couchville Pike, he had the right to warn the occupants of the other machine of his intention. In so doing he would not be instigating a violation of law; and if he gave timely warning and had just cause for believing that his signal had been received and would be heeded, we are unable to discover wherein negligence could be predicated. Again, the learned judge assumes to state that the law

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as written in the statute governed the situation and not the common law rules. We think the eighth assignment of error is well taken. Our observations also are a warrant for the conclusion that we think assignment No. 9 to be well taken.

One of the grounds urged in assignment No. 10 was the refusal of the Court to give in charge a special request as follows: "If you believe from the evidence that defendant Coe seasonably signalled to Ward to turn to the west side of the Murfreesboro Pike and that said Ward did so turn and if thereby the defendant had reasonable cause to assume that Ward was going to continue on that side of the Murfreesboro Pike turn towards the east to enter the Couchville Pike, and if thereafter the said Ward changed from the west side of the Murfreesboro Pike and by so doing solely and proximately caused the injury, then plaintiff cannot recover. Also for refusing to give in charge in substance that if the jury found that Coe, a proper distance from the intersection of the two pikes, indicated by proper signal the course of his car, an intention to the driver of the incoming car that he, the defendant, proposed to leave the Murfreesboro Pike and turn into the Couchville Pike and in so doing to use a part of the Murfreesboro Pike which he was not then using, then the person in control of the inbound car should have governed himself accordingly by having his car under reasonable control or should have turned to the west side of the pike, provided he could have safely done so, and if the failure of the person in control of the incoming car to so act solely and proximately caused the collision, then the plaintiff cannot recover.

In these two requests were embodied succinctly the contentions of plaintiff in error. We are of opinion that they were sound in law and that there was much evidence tend-

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ing to support the theories embodied. If so, then they should have been given to the jury. Particularly should the first of the requests have been submitted. We are of opinion that the conduct of Coe under those circumstances was consistent with the highest degree of care and that if the collision occurred as hypothetically stated, then plaintiff in error should not be visited with the consequences.

We repeat that plaintiff in error had to exert the utmost care. At the same time it was not an insurer against the untoward and unlawful acts of others. These requests did not undertake to modify the degree of duty owing by the carrier. The drafts man simply sought to relieve the carrier of the results of an unforeseen and unforeseeable series of acts. It is for the reason that the Court was so particular to lay down the rule of almost absolute liability that we are persuaded that justice required the presentation in succinct form of the contention of the carrier that another and not itself was the sole producer of the collision.

For the reasons indicated, we feel constrained to reverse and remand for a new trial at the cost of appellee.

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GEORGE JOHNSTON v. JOHN B. RANSOM COMPANY.

Writ of certiorari denied by the Supreme Court, 1917.

1. **NON COMPOS MENTIS.** *Condition developing after trial and before appeal. Appointment of next friend.*

When a party to a litigation tried in a lower tribunal becomes insane after trial and before perfecting an appeal, the lower tribunal has the authority to appoint a next friend for the purpose of praying and perfecting an appeal. And the name of the next friend, whether such or as guardian ad litem, is immaterial.

2. **PLEADING AND PRACTICE.** *Withdrawal of plea and filing of demurrer. Discretion.*

Circuit judges may at any stage which they deem proper permit a defendant to withdraw a plea in bar and interpose a demurrer to the declaration.

3. **MASTER AND SERVANT.** *Exposure of servant to cold weather. Knowledge and assumption of risk.*

The servant of a master engaged in driving a delivery wagon cannot recover of the master for sufferings occasioned by exposure to the cold where the servant is aware of the temperature and has the option of discontinuing employment, or where he has opportunity at different times to seek warmth.

FROM DAVISON COUNTY.

Appealed in error from the First Circuit Court of Davidson County. THOS. E. MATTHEW, Judge.

J. W. PUCKETT for Plaintiff in Error.

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CHARLES C. TRABUE and AVERY HANDLEY for Defendant in Error.

MR. JUSTICE HALL delivered the opinion of the Court.

THIS appeal involves the correctness of the judgment of the Court below, the Circuit Court of Davidson County, sustaining a demurrer to the plaintiff in error's declaration and dismissing his suit, which was brought against the defendant in error to recover damages for personal injuries sustained by him.

The declaration alleged:

"Upon the 11th day of December, 1914, the defendant was engaged in operating machinery with engines, boilers, saws and sawing of lumber and making of boxes, said machinery being run and operated by steam power, said machinery being enclosed in a building where defendant's employes and servants were warmed by the use of fire and steam; their duties were to work in said building and around said machinery, and were not exposed to the cold weather, and plaintiff being one of the defendant's employes and servants, whose duties were to work in said building and clean up and sweep the floors, and take away kindling and moving of lumber inside of said building, and plaintiff had been engaged in such business for about three months prior to the 11th day of December, 1914, when on said date the 11th day of December, 1914, the defendant ordered, directed and commanded plaintiff to go on a wagon and haul boxes against plaintiff's protest, it being a very cold and disagreeable day, when plaintiff was ordered and commanded by defendant to go, with the threat if he did not go, he would be fired or lose his job, and plaintiff, being a very poor man with a large family, a wife and six children to support,

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who were dependent upon his labor, and plaintiff did go on said wagon and haul boxes until about two o'clock in the afternoon of said day, when plaintiff was chilled and frozen on account of being exposed to said cold weather, and fell helpless in said wagon, and was carried to his home, where he has been confined to his room and helpless ever since, and on account of said freeze and exposure, plaintiff is injured all through his body, his hands and feet frost bitten, and finger and toe nails came off, whereby and on account of which injury wrongfully and negligently inflicted by defendant, plaintiff was caused to suffer great mental and physical pain and anguish and suffering loss of time and to pay out large doctor bills, and to be permanently injured without any fault on his part.

The defendant at the time of said exposure and injury of plaintiff had in its service divers and many servants and employes who were accustomed to cold weather and outdoor work that defendants could have sent on said wagon to do said hauling, and was requested to do so for fear that plaintiff could not stand the cold, but plaintiff was ordered to go on said wagon, defendant thereby wrongfully and negligently injured him as aforesaid."

To this declaration defendant in error filed a plea of the general issue. Subsequently, on March 18, 1916, defendant in error asked leave to withdraw its plea and file a demurrer, which application was granted by the Court, and the plea was withdrawn, and a demurrer was filed, stating the following grounds:

"1. Because said declaration states no cause of action against it; and,

"2. Because the danger complained of in the declaration was open and obvious to the plaintiff; and,

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"3. Because the fact that the exposure to the weather, of which he complains, was dangerous or hurtful to him by his prolonged stay in the open could not have been known to anyone as well as to him; and,

"4. Because the declaration shows on its face that the proximate cause of the injury was not the act of the defendant in directing the plaintiff to work outdoors, but was plaintiff's voluntary act in remaining outdoors and exposed to the weather after he knew, or should have known, that such exposure was becoming dangerous; and,

"5. Because it appears that plaintiff could have desisted from outdoor work, or found shelter, or, by other simple and ready remedies easily accessible to him, have saved himself from the exposure of which he complains."

The cause was finally heard upon said demurrer on March 27, 1915, when it was sustained by the Court, and plaintiff in error's suit dismissed. From this judgment of the Court plaintiff in error prayed an appeal to this Court, and was given twenty days in which to perfect his appeal.

On April 11, 1916, a petition was filed by plaintiff in error's wife, Beulah Johnston, averring that since the dismissal of plaintiff in error's suit upon said demurrer, he had become a *non compos mentis*, and was not competent or capacitated to perfect his appeal by taking the oath for poor persons, or to take any step in the perfection of his appeal, which had theretofore been granted by the Court. The petition prayed that the Court appoint some person as guardian *ad litem* for the plaintiff in error to make said affidavit and perfect said appeal for him.

At the same time application was made to the Court that it grant the plaintiff in error further time in which to perfect said appeal. This application was granted, and

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ten days additional time was granted plaintiff in error in which to perfect said appeal; and subsequently, and within the additional time allowed in which to perfect said appeal, the Court entered an order reciting that it satisfactorily appeared to the Court that plaintiff in error was a *non compos mentis*, and had become such since the institution of his suit, and that plaintiff in error's attorney be appointed guardian *ad litem* for him to perfect said appeal by executing a proper appeal bond, or otherwise complying with the law by making and filing the oath prescribed for poor persons. The action of the Court in permitting said petition to be filed, and adjudging that plaintiff in error was a *non compos mentis*, and appointing a guardian *ad litem* to perfect his appeal for him, was excepted to by the defendant in error.

The record discloses that said guardian *ad litem* did seasonably perfect said appeal for plaintiff in error by executing the oath in his behalf prescribed for poor persons. Defendant in error has moved this Court to dismiss the appeal on the ground that the practice pursued by the Court below is unknown to the forms and procedure of the Courts of this state.

We think the Court below, upon the fact of the plaintiff in error's mental incapacity being made to appear by petition or otherwise, would have the power and authority to appoint a next friend for the plaintiff in error to perfect and prosecute his appeal to this Court, and while the order of the Court below appointing plaintiff in error's attorney to perform the service for him designates such attorney as a guardian *ad litem*, we think this is immaterial, and this Court will treat him as a next friend of plaintiff in error, and as being properly appointed by the Court below, and will proceed to consider the case on its merits.

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There are no proper assignments of error filed by plaintiff in error's counsel challenging the judgment of the Court below, because there is no specification in what purports to be the assignments of error pointing out specifically wherein the judgment of the Court is erroneous, and how plaintiff in error was prejudiced thereby.

By rule 14, subsection 2, of the rules of the Supreme Court and of this Court, appellants are required to file assignments of error containing a statement of the errors of fact or law relied upon to reverse or modify the judgment, showing specifically wherein the action complained of is erroneous. By subsection 3 of said rule it is provided that when the error is in the action of the Court upon a preliminary motion, demurrer or plea, the substance of such motion, demurrer or plea shall be stated, and the action of the Court thereon, citing the pages of the transcript where the same appears. 126 Tenn., 722.

However, treating the purported assignments of error as properly challenging the action of the Court in sustaining the demurrer of the defendant below, and in dismissing plaintiff in error's suit after a careful consideration of the case on its merits, we have reached the conclusion that the demurrer was properly sustained. It was within the discretionary powers of the Court to permit the defendant in error to withdraw its plea and demur to the declaration. *Lowe v. Morris*, 4 Sneed, 71; *Chesnutt v. Frazier*, 6 Bax., 219; *Merchant v. Preston*, 1 Lea, 282.

The plaintiff in error's declaration averred that his injuries were the result of the negligence of the defendant in error in directing him, as its employee, to drive a wagon on a cold and disagreeable day, which order he obeyed over his protest, and was thereby exposed to the cold weather, and was caused to chill and freeze.

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We do not think the declaration states a valid cause of action. It is plain from the averments of the declaration that plaintiff in error knew as much about the condition of the weather as the defendant in error knew. At least, it is not averred in the declaration that plaintiff in error was not familiar with the condition of the weather when he undertook to obey the order of defendant in error. No reason appears why he stayed out in the weather until he became chilled or frozen. He certainly knew better than any one else how he was being affected by the cold, and certainly was not warranted in staying out in the cold until he became chilled and frozen, a result which he alleges in his declaration. He could have abandoned his employment and sought shelter. As aptly said by counsel for defendant in error in his brief, if plaintiff in error can recover because he was told to work outdoors in the cold on a cold day, a recovery could as well be had by one who was told to work outdoors on a warm day, and who had suffered from the heat, or by one who was rained on and caught cold.

It is apparent from the averments of the declaration that plaintiff in error knew the danger incident to exposing himself to the cold on the day in question better than anyone else, and the fact that the master may have directed him to expose himself to the inclement weather, and that he did so through fear of losing his position, is no sufficient reason for his doing so. Ordinary care required him to protect himself from the danger of which he was necessarily cognizant. At least, he could have been cognizant of it by the exercise of ordinary care, because it was bound to have been patent and obvious to a person of ordinary intelligence. The rule is well established that if the servant has knowledge, or means of knowledge, of an obvious danger connected with his employment or

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work, and continues in such employment, he assumes the risk thereof, and no recovery can be had for an injury growing out of such danger. *Brown v. Electric Co.*, 101 Tenn., 252; *Smith v. Dayton Coal, Etc., Co.*, 155 Tenn., 543; *Corbitt v. Smith & Co.*, 101 Tenn., 268; *Ferguson v. Phoenix Cotton Mills*, 106 Tenn., 236; *Railroad Co. v. Gower*, 85 Tenn., 465; *Locke v. Interurban Ry. Co.*, 1 Higgins, 18; *Box Co. v. Gregory*, 119 Tenn., 541.

The judgment of the Court below is affirmed.

N., C. & ST. L. RAILWAY V. MRS. VIRGINIA GARDNER.

Affirmed by the Supreme Court, 1917.

1. **FIRES.** *Spreading of by engines. Peremptory instructions where railroad shows perfect equipment. Not to be given if track littered with combustibles.*

The rule whereby railway companies sued for the spreading of fires by engines are entitled to peremptory instructions where they prove undisputedly careful handling and perfect equipment has no application where it is shown that the fire was spread to adjacent lands by reason of negligent accumulation of combustibles upon the right of way.

2. **GROWING TIMBER.** *Injury to or destruction of by fire. Measure of damages. Permanent injury to realty.*

Where a tract of timber of all ages and kinds held for ornament and for future growth and not exclusively for the timber market is destroyed or injured by fire, the proper measure of damages is the difference in the market value of the realty immediately before and immediately after the fire.

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3. **SAME.** *Methods of proof. No conflict between two lines of evidence converging upon the point of market value.*

It is not error for the court in such action to allow evidence and to give instructions to consider testimony both as to the difference in market value of the land as realty immediately before and immediately after the fire and to show the actual market value of the trees that were injured or destroyed.

4. **SAME.** *Duty to minimize damages. Not applicable when.*

There is no duty resting upon a landowner suing for the destruction of timber by fire and asking for the difference in market value of his land just before and just after the fire to take any steps toward marketing the injured timber for the purpose of reducing damages.

5. **SAME.** *Evidence of subsequent conditions competent when.*

Such landowner may show the decayed and injured condition of the timber some time after the infliction of the injury for the purpose of showing the extent of the damage suffered at the time of the fire.

FROM WEAKLEY COUNTY.

Appealed in error from the Circuit Court of Weakley County. JOSEPH E. JONES, Judge.

H. H. BARR and R. A. ELKINS for Plaintiff in Error.

MAIDEN & MAIDEN and WILLIAM RANKIN for Defendant in Error.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

CLAIMING to have been damaged \$3,000.00, Mrs. Gardner instituted suit for that amount against the Railway Company for the destruction and injury to a tract

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of wooded land in Weakley County situated near the town of Martin. In her first count she averred generally that the Railway Company had negligently set fire to her premises by sparks from passing engines, and thus caused the damage. In the second count she charged that the defendant company had negligently allowed weeds and rubbish to accumulate on its right-of-way, that it had through its servants set afire this rubbish, and that the fire thus begun had spread to adjacent premises belonging to the defendant, the plaintiff below, and destroyed and injured some ninety-five acres of her timber and depreciated it in value.

Upon issue of not guilty the case was tried by the Circuit Judge and a jury. The verdict was for \$1,500.00. The Court declined to grant a motion for a new trial, and thereupon the Railway Company appealed and assigned numerous errors.

It is urged in the second assignment that there is no material evidence to sustain the verdict; and further that as the evidence was conclusive with respect to the condition of the engine of the plaintiff in error which evidently set out the fire, the inference of negligence was negatived and the verdict should have been against Mrs. Gardner.

There is no merit in this assignment. Upon this feature of the case two questions arose, namely, whether the fire was set out by the engine of the company, and whether it was negligent either in the operation of its trains or with respect to the condition of its right-of-way. It may be granted that there is no material evidence contravening that of the Railway Company that its spark arrester was up to the highest state of the art. But in view of the testimony of one witness, who was some distance away from the track, in substance that large and hot cinders were thrown upon him, there might be some question of negligent operation. But however that may be, there is much

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evidence to the effect that the right-of-way at the point of ignition had on it much combustible material, that the fire was first seen there, and that it subsequently traveled to the lands of Mrs. Gardner. It was also shown that the season was extraordinarily dry, and that upon the day of the fire a swift wind was blowing from the South. These were all sufficient to take the case to the jury, notwithstanding proof showing perfect equipment of machinery. *Railroad Co. v. Lumber Co.*, 130 Tenn., 354; *West End Park Co. v. Railway*, Davidson Law, Dec. Term, 1915, a case decided by this Court and affirmed by the Supreme Court. It was therein ruled that when it was shown that the right of way was littered with combustibles the Railway Company was not entitled to peremptory instructions even if it had the most cogent proof as to the condition of its machinery. We overrule this assignment of error.

We reserve the third assignment for treatment last. In the fourth specification it is urged that the trial Court was wrong in declining to withdraw from the jury some evidence whereby the plaintiff below sought to show the value of the land and the timber as a whole before the fire, particularly the value of the land per acre, and also the value of the timber per acre; and then permitting proof of the value of the land and the timber after the fire.

One criticism that may be aimed at this assignment is that the objectionable evidence nor its substance was included in the motion for a new trial. But we pass that over and consider it upon its merits. This is done mainly for the reason that it has to be dealt with again in considering the assignment upon the charge of the Court.

The evidence objected to was in substance that the tract of 95 acres burned over was worth upon the market at the time of the fire \$200.00 per acre, treating the timber as a part of the realty, and that it was worth \$175.00 per

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acre after the fire, considered in like manner. There was also objection to a line of evidence to the effect that the timber on the land, apart therefrom, was worth \$100.00 per acre before the fire, and \$75.00 after it was burned.

The first criticism urged is that the Court allowed the witnesses to speak with reference to damages or to a measure of damages not recognized in this jurisdiction. It is contended by able counsel that the rule established in this state in cases of destruction of growing timber is its market value as it stood at the time of the injury. We are referred to cases of *Barnes v. Copper Co.*, 60 S. W. Rep., 593; *Scott v. Russell*, 15 Lea, 497; and *Hays v. Holt*, 110 Tenn., 42, as proclaiming and establishing this doctrine, and strengthened by sustaining cases from other states.

The first case cited affords appellant more comfort than the others. It is true that Judge Wilson, who prepared the opinion of the Court of Chancery Appeals, announced the rule to be as contended. But it is evident that the question was not elaborately discussed nor argued. Again, reference to the record will reveal the fact that complainant did not pretend to sue for injury to realty, but for destruction of valuable marketable timber. Hence, the well-founded reason for confining him to the measure of damages claimed in his pleadings. And the case of *Hays v. Johnson* may be disposed of by saying that so far as the opinion discloses plaintiff never claimed more than the market value of the cordwood cut except that he did assert that as defendants were trespassers the highest market value should have been awarded them. But even in that decision the Court recognized the rule that the owner of land whose timber had been destroyed may, upon proper showing, recover something in addition to the value of his timber, namely, special injury to the real

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estate. We affirm that the measure of damages contended for by appellant would fall far short of the demands of justice in the case of an owner who shows not only the destruction of marketable timber but injury to the freehold, impairment of growth of other trees, and diminution in value of the land for the purposes for which it was being held.

It was shown in the instant case that this tract of land was adjacent to the town of Martin, that it was well located and ideally situated for town lots; that it was noted for its number of sound trees and its number of promising trees, these having been the especial care of the owner.

It was shown that the parcel of land was not held as a timber tract for the lumber market, but for other purposes, and that it had, because of its situation, and for other reasons, a peculiar value. Nor must it be overlooked that plaintiff below asserted in her pleadings that her lands had been damaged and that she did not confine her claim of recovery to the market value of the trees damaged. In addition to the loss of the timber she averred the destruction of fences and injury to her barn. It is manifest from all these that she was suing for permanent injury to her freehold and not merely for temporary or separable injuries.

We are of opinion that both justice and reason demand the establishment in such case of the rule of damages to the realty. We further assert that this rule is warranted by the authorities in Tennessee and is upheld in situations above described by the best considered cases from other jurisdictions. In *Ensley v. Nashville*, 2 Bax., 144, it was distinctly recognized that in case of injury to timber growing upon lands in or adjacent to a town or upon premises where the trees have a prospective value over and

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above their worth upon the market, the recovery should not be limited to the market value of the trees. In *Scott v. Russell*, *supra*, while it was announced that the value of timber and minerals after extraction by a wrongdoer was a measure of damages, it was stated by Judge Cooper that the owner was entitled in addition thereto to an amount which would compensate him for the peculiar injury to the land occasioned by the removal of parts of the realty.

We find an elaborate note to the case of *Ball Lumber Co. v. Simms Lumber Co.*, 18 L. R. A. (N. S.), 244, dealing with this subject. There is in this note a chapter dealing with destruction of timber by fire. We find a number of citations to the effect that when the mere market value of the timber will not compensate the owner for its destruction, the measure of damages is the difference between the value of the land considered as a whole just before and just after the fire. It will be ascertained that the annotator brings to view as considerations for excepting some cases from the general rule restricting owners to the market value of the timber, that feature of peculiar use or of particular value which the owner attached to the timber as a part of his freehold. This note is supplemented by a note to be found in the subsequent case of *Reynolds v. Railroad*, 52 L. R. A. (N. S.), 91. In this latter collation of authorities the editor reaffirms the soundness of the rule announced in the earlier cases. In the body of the opinion just cited are many reasons for approving the rule in particular cases of allowing the owner to recover for depreciation in the value of the land.

Able counsel for appellant have directed our attention to the case of *Railroad v. Beeler*, 126 Ky., 328, reported in Vol. 15, A. & E. Annotated Cases. As stated, there is an extensive annotation and reference to decisions. We

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have examined such of those as were accessible to us, but we do not recall after such examination any reason for modifying the position which we have taken in the instant case. It will be discovered that in quite a number of those decisions the plaintiff never claimed any more than the value of the timber; and also that the timber sued for was held for the market, and not for use as part of the realty; and further that the trees damaged were easy to be counted, and had a readily ascertainable market value. This suffices to show that the rule contended for is not universally applicable. And while there are decisions from nearly all the States, it will be ascertained upon an examination of the annotations in the 18th and 52nd Volumes of L. R. A. (N. S.), above cited, that a number of the States announcing the rule contended for by appellant also recognize the applicability of the rule of damages to the realty in certain classes of cases. See also Sections 48 and 49 under the head of Damages in 8th Ruling Case Law.

We overrule this fourth assignment of error.

In the fifth assignment it is said that the Court committed error in allowing testimony to the effect that there is a connection between burned timber and worms, and that the burning of timber is likely to produce worms at some future time, and also that the Court permitted recovery for subsequent conditions. The specific contention is that the damages were to be assessed as of the day of the injury, and that the development of worms was a subsequent condition with which the defendant was not concerned, and besides that defendant in error should have anticipated the likelihood of worms, and should have marketed the injured timber. We are of opinion that no reversible was committed in this regard. We shall assume for the present that the Court instructed the jury to ascertain the amount of damages sustained by Mrs. Gardner immediately after

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the fire. If so, then it is true the subsequent damaged condition of the trees may not have been very material, but at the same time this condition was evidence which reflected upon the damages committed by the fire. In other words, we are of opinion that it is competent to show as a consequence the susceptibility of burned trees to the development of worms, and also the likelihood of worms going from tree to tree and impairing the beauty and value of a forest as aids in determining the extent to which the land as timbered was damaged by the fire. We overrule this assignment of error.

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The basis of the seventh assignment is the following instruction of the Court to the jury given in substance: That if the jury found in favor of the plaintiff they should look to and consider the value of the land with the timber standing upon it, whether merchantable or unmerchantable, just before the fire, and what was that value immediately after the fire, and then find what the value of the land with the timber standing on it as a part of the realty was immediately after the fire. That the jury should also consider what the value of the timber was without regard to the land immediately before and immediately after the fire, and ascertain the reasonable market value thereof both merchantable and unmerchantable at the two times named. That these were matters which they should consider in determining what damage Mrs. Gardner had sustained, and that it was proper for the jury to consider how many trees were burned, their kind, size and situation, and their value immediately before and immediately after the fire, and also how much was destroyed or injured. That while this was no iron-clad rule, and there was no iron-clad rule for estimating damages, the damages awarded should be such as would compensate the plaintiff for the injury done

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to her property. That the damages should be for the value of the timber damages for as just such damages as have been done to her timber, and that the best way to find those damages, if any to be given, is to find out what the reasonable market value of the land, together with the timber growing thereon was worth before the fire, and then what the same land and the timber standing thereon were worth immediately after the fire, and the difference should be the damages; and that the jury might consider the evidence as to the value of the timber before the fire and after the fire.

It is apparent that this instruction is much involved. It discloses a great deal of redundancy and repetition, and these characteristics necessitate a construction of the charge by us before application of the criticism made of it. It is evident that the Court told the jury that the time to which they should direct their attention in estimating the damages was primarily the value of the land with the timber included just preceding the fire and to ascertain the market value of the lands with timber as a part of it immediately after the fire, and to award plaintiff the difference as a recovery. It is true that the judge called the attention of the jury to the evidence admitted with respect to the injury to the timber considered apart from the land, but he correlated this with his predominant instructions that the measure of damages should be the impairment of the freehold. Being of opinion that this is the reasonable interpretation of the charge, and believing further that the jury so understood it, we find no reversible error therein. It is true that there is seeming opposition and contrarity in the charge, just as it so appeared in the production of the evidence; but we are of opinion that this conflict dissolves when it is borne in mind that the paramount rule given was that of damage to the realty, and

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that reference to the market value of the timber apart from the realty was for the sole purpose of aiding the jury to determine the extent to which the land had been damaged. It is not unreasonable to bring damage to the timber into consideration as one of the evidences of damage; nor is it unreasonable to allow evidence of permanent injury to the realty as a whole, including depreciation in the value of particular timbers. So that we do not believe that the Circuit Judge was guilty of the error applying two measures of damages.

We recur to the case of *Reynolds v. Railroad, supra*, and rely upon the reasoning of the Court as a complete answer to the position taken by appellant upon this point. It was there shown that the two species of evidence were not in conflict, and that the one might aid the other and be of service to the jury in applying the rule of damage to the freehold in a case where the latter was the measure of damages. It was also noted in the proceeding L. R. A. cases and annotations that the two rules might be used or that they were not necessarily in conflict, and that situations might arise where both were needed to do complete justice. We overrule this assignment of error.

The predicate of the eighth assignment was an instruction bearing upon the evidence as to worms in the trees. The Court told the jury that if they found that worms were the usual incident or the proximate result of the fire, they might take this fact in consideration in determining the worth of the timber immediately after the fire. We see no error in this for the reason stated in treating of the admission of evidence as to worms. It will also be observed that the Court reminded the jury that this circumstance should be considered as merely evidential of the value immediately after the fire.

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It is complained in the ninth assignment that the Court instructed the jury in substance that plaintiff could not permit her timber to stand for two years or an unreasonable length of time and then claim damages for the condition of the timber at the end of one or two years, but that it was competent to look to the proof to see whether or not the injury to the trees was a temporary injury. There is no error in this. But it is said in this connection that the Court should have given special request to the effect that it was the duty of the plaintiff to minimize the loss by marketing the injured and dying property at the earliest practicable time, and thus reduce the loss, and that the jury should, in estimating damages, take into consideration the loss which was thus attributable to the failure of the plaintiff to market her timber. We find this special request made the basis of the tenth assignment of error. We find no error in this respect. We repeat that the Court told the jury that the measure of damages would be the difference in the value of the land immediately before and immediately after the fire. We assume that the jury obeyed these instructions, and that they did not heed the care or lack of care upon the part of the plaintiff after the fire. Now, if the jury thus confined their estimate the subsequent conduct of the plaintiff was of no concern of the railroad company. Hence there was no error in declining to charge the jury upon the subject. We overrule the ninth and tenth assignments of error.

In the eleventh assignment of error appellant complains that the Court refused to grant its special request that the jury ascertain the amount of the damages by considering the market value of the injured trees, post, fences and boards before the fire and their value after the fire, and deduct the latter from the former, and make the difference the amount of the damages. We overrule this assignment

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for the reason that it is at variance with the measure of damages approved by us.

We recur to the third assignment of error wherein the amount of the verdict, to-wit, \$1,500.00, is assailed as excessive. Plaintiff introduced some seven or eight witnesses who placed the damages at \$2,500.00, or approximately. The witnesses of the defendant, particularly one who answered, said that the damages were \$250.00. How the jury arrived at \$1,500.00 is as usual one of the mysteries, but it seems to be the privilege of that part of our judicial system to perform its *rites* without rendering reasons. It might be said that the sum agreed upon was the result of compromise. But how this is we do not know. We find in the record much testimony upon which the jury could base the amount stated, or could have rendered a larger sum. Nor are we able to say in such condition of the record that the jury acted capriciously or corruptly. For these reasons we do not believe we are authorized to disturb the verdict, and direct its affirmance with cost.

Baird v. Lebeck Bros.

MRS. A. E. BAIRD V. LEBECK BROTHERS.

MARRIED WOMEN. *Liability for goods furnished for family use upon credit extended to the wife.*

A wife who opens and runs an account with a merchant for merchandise furnished herself and family is personally liable therefor under Acts of 1913, Chapter 29, where the credit was extended upon her promise alone and not as agent of the husband, although she be living with the husband at the time.

FROM DAVIDSON COUNTY.

Appealed in error from the First Circuit Court of Davidson County. A. G. RUTHERFORD, Judge.

M. T. BRYAN for Plaintiff in Error.

W. B. MARR for Defendant in Error.

MR. JUSTICE HALL delivered the opinion of the Court.

THIS action was brought by Lebeck Brothers before a justice of the peace of Davidson County against Mrs. Baird to recover upon an account for merchandise purchased by her of them subsequent to January 1, 1914, upon which date Chapter 26 of the Public Acts of 1913, went into effect, it being an Act to remove disabilities of coverture from married women; and to repeal all Acts and parts of Acts in conflict therewith.

The case was finally carried to the Circuit Court of the county, where it was tried before the Court without the intervention of a jury, and a judgment was rendered in favor of the plaintiffs below for \$202.30, the amount of

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said account; from which judgment Mrs. Baird appealed to this Court, after her motion for a new trial had been overruled, and she has assigned errors.

The undisputed evidence shows that the account was contracted by Mrs. Baird while she was a married woman—was principally for family necessities, and the various items constituting said account were charged to her personally on the books of defendants in error at the time they were purchased. Mrs. Baird had had a running account with defendants in error for some twenty-five years prior to the institution of the present suit. A portion of the account sued on was for merchandise purchased by Mrs. Baird prior to January 1, 1914, but the Court only rendered judgment for that portion of the account contracted subsequent to said date, and there is no dispute that said portion aggregated the sum of \$202.30, the amount of the judgment.

By the assignments of error it is insisted:

First, that the Court erred in not sustaining plaintiff in error's plea of coverture, filed as a defense to the suit, and in rendering judgment against plaintiff in error for the amount of said account.

Prior to the passage of chapter 21 of the Acts of 1913, the well-settled doctrine of the common law obtained in this State that a *feme* covert had no power to contract, and as long as she was laboring under the disability of marriage, all of her contracts, by which she sought to bind herself or property were void by reason of her incapacity to make them. *Shacklett v. Polk*, 4 Heisk., 105; *Pearce & Co. v. Thornton*, 11 Lea, 295; *Meagher v. Hollenberg*, 8 Bax., 267; *Mercantile Co. v. Bowers*, 105 Tenn., 138.

It was also the well-settled law of this State prior to the passage of Chapter 26 of the Acts of 1913, that in cases where a married woman pled her coverture no personal

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judgment could be rendered against her. *Theus v. Suggest*, 93 Tenn., 41; *Flanagan v. Grocery Co.*, 98 Tenn., 599; *Warner v. Freeman*, 85 Tenn., 513.

We think, however, that the common law with respect to contracts of married women has been changed by the provisions of the Act referred to. The title of said Act is:

“A bill for an Act to be entitled ‘An Act to remove disabilities of coverture from married women, and to repeal all Acts and parts of Acts in conflict with the provisions of this Act.’

“SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That married women be, and are, hereby fully emancipated from all disability on account of coverture, and the common law as to the disabilities of married women and its effects on the rights of property of the wife, is totally abrogated, and marriage shall not impose any disability or incapacity on a woman as to the ownership, acquisition, or disposition of property of any sort, or as to her capacity to make contracts and do all acts in reference to property which she could lawfully do if she were not married; but every woman now married, or hereafter to be married, shall have the same capacity to acquire, hold, manage, control, use, enjoy, and dispose of, all property, real and personal, in possession, and to make any contract in reference to it, and to bind herself personally, and to sue and be sued with all the rights and incidents thereof, as if she were not married.

“SEC. 2. *Be it further enacted*, That all Acts and parts of Acts in conflict with the provisions of this Act be, and the same are, hereby repealed.

“SEC. 3. *Be it further enacted*, That this Act take effect from and after January 1, 1914, the public welfare requiring it.

“Passed February 20, 1913.”

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The provisions of the foregoing Act are very broad, and we think impose personal liability upon the wife for all of her contracts, and she may be sued upon them as though she were a single woman.

It is insisted, however, that this is not true of contracts for family necessities, which was the character of the merchandise purchased by Mrs. Baird of defendants in error; but that the husband is liable upon such contracts, because the wife, in purchasing necessities for the family, is acting as the agent of her husband.

We are of the opinion that the Act of 1913 makes no distinction between a contract for family necessities and one for some other purpose. It is true that the greater portion of the goods purchased by Mrs. Baird was for members of her family, and not for her personally, but we think this is immaterial. She made the contract, the credit was extended to her, and the items were charged to her on the books of the company; and we think she is bound upon said contract.

The record discloses that on December 2, 1915, Mrs. Baird wrote defendants in error a letter as follows:

“LEBECK BROS.:

“I am very sorry not to have settled my account with your firm when it was due, but you have shown confidence in me many times before. You know I will pay, and you know now. Mr. Baird has worries enough, and I don't wish him to be annoyed with my bill.

“I am expecting some money next month, and will pay you then part any way. This is the best I can do at present, so please be patient.

“Respectfully,

MRS. A. E. BAIRD.

December 2, 1915.”

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This letter shows that Mrs. Baird fully recognized the account as hers, and that she was bound for its payment. The Act of 1913, in express terms, fully emancipates from all disability on account of coverture, and the common law as to the disabilities of married women and its effects on the rights of property of the wife is totally abrogated, and she is given the right to contract and bind herself personally as fully as if she were not married.

It is not contended that Mrs. Baird, in fact, purchased said goods as the agent of her husband. Indeed, there could be no foundation for such contention, because all the evidence shows that the contract was her own personal contract.

There is no error in the judgment of the Court below, and it is affirmed with costs.

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1. JUVENILE COURT. *Exclusiveness and extent of jurisdiction.*

Jurisdiction of the juvenile court of a county is exclusive whenever and wherever a minor under sixteen years of age is arrested upon criminal process, this jurisdiction attaching at the moment of arrest and continuing until the arrival of the minor at maturity. And in such case it is the duty of the officer to deliver such infant into the custody and control of the juvenile judge.

2. SAME. *Ignorance as to age and stage at which age becomes known immaterial.*

The power of the criminal courts to deal with an infant under sixteen years of age is none the less invalid because of ignorance of the age of the culprit; and the proceedings of the criminal court are rendered invalid upon the discovery of the age of the infant even after regular trial and conviction. And consent of the infant or attempt by him to waive the jurisdiction of the juvenile court will be ineffectual.

3. SUSPENSION OF PUNISHMENT. *Suspension of judgment.*

The several criminal and circuit judges of the state have no power expressly to suspend judgment and punishment in criminal cases for an indefinite period. But this rule does not prevent suspension of sentence for a brief period and for cause.

FROM MAURY COUNTY.

From the Circuit Court of Maury County. W. B. TURNER, Judge.

W. C. WHITTHORNE for the State.

W. R. PEEBLES for Defendant.

MR. JUSTICE MOORE delivered the opinion of the Court.

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THIS is an appeal from a decision of Judge Wikle, sitting by interchange with Judge W. B. Turner, dismissing a petition for a writ of *habeas corpus* filed by petitioner, Robert Webb, seeking to be discharged from a sentence pronounced against him by the Criminal Court of Maury County. It appears from the record that Robert Webb is a colored boy, born the 29th of March, 1899, and in August, 1914, when he was then less than sixteen years old, he was arrested on a warrant issued by a justice of the peace of Maury County upon the charge of illegally selling intoxicating liquor. At the November term of the Circuit Court of that county he was indicted by the grand jury charging him with the offense stated *supra*. There is a Criminal Court established in Maury County by Chapter 376 of the Acts of the Legislature of 1899, over which the County Judge presides and discharges the duties of Judge of such Criminal Court. After this negro boy was indicted, his case was transferred to the Criminal Court of Maury County for trial, and was tried in that Court on the 13th of January, 1915, and was found guilty of the charge against him. At the time of his conviction, or shortly before that time, and during the same term of Court, his stepfather was also tried upon a like charge and found guilty, when a fine of \$50.00 was imposed upon him, and he was sentenced to three months to work on the public roads of the county. Robert's mother, who was then living with his stepfather, was at the time in a delicate condition, and expected to be shortly confined. She was also the mother of several small children, and in view of her condition, and of the fact that there would be no large person left with her to look after and take care of her if both her son, Robert, and her husband were sent to the workhouse, on the suggestion of someone, it not clearly appearing who made the suggestion, the trial judge suspended sentence of

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the petitioner, Robert Webb, and whether the sentence was suspended for a definite or an indefinite time is somewhat doubtful, and will be noticed later in the opinion. When Robert's trial was had, and he was found guilty of the charge, he was defended by two lawyers in Columbia, but did not tell either of them until some time after his conviction that he was under sixteen years of age, and consequently his lawyers did not know his age at and during the trial of his case. That is a disputed question in this record, but we think it clear from the testimony of the lawyers, as well as the testimony of Robert himself, that they did not know his age during the trial, and did not learn he was under sixteen years old until some time after he was convicted of the offense with which he was charged.

His age was not brought to the attention of the Court during the trial, nor until some days thereafter, when the trial judge was informed that the boy was under sixteen years old. Just who suggested that fact to the trial judge is not certain, but we infer the suggestion was made by one of the lawyers who defended him. Just where the judge was when he was so informed, whether in the courtroom holding Court, or in his office and off the bench, is not altogether certain, but we are inclined to the opinion that the statement was made to the judge while he was off the bench in an adjoining room, and when Court was not in session. We think from the record that it is fairly inferable that the trial judge learned of the age of this boy about the time he indefinitely suspended pronouncing sentence or judgment on the verdict of the jury.

It is clear that, within a day or two after the verdict of guilty was returned by the jury, the judge decided to hold up or suspend sentence, and not pronounce judgment on the verdict against this boy until his stepfather could work out his sentence on the road and go back home to take care

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of his wife and her children, the mother of Robert. In his testimony the trial judge states that he suspended sentence or pronouncing judgment on the verdict of the jury against Robert for a period of three months, that being the length of time his stepfather was sentenced to work on the road. But we entertain some doubts about the definiteness of the suspension of the trial judge in view of the fact that his memory of the transaction is not altogether clear, and in view of the additional fact that it was known at the time that if the stepfather was unable to pay or secure the fine of \$50.00 and the costs of the suit, he would be compelled to remain at work on the road and in the county workhouse until he worked out not only his three months' sentence, but the fine and costs adjudged against him, which, as everyone must know, was indefinite and uncertain as to the time required to work out such sentence, fine and costs. For these reasons we are very strongly inclined to the conclusion that the sentence of Robert on the verdict of the jury was indefinitely suspended by the trial judge, or at least it was understood that such sentence was to be suspended until his stepfather could be released and return home to take care of his mother and the children, which of course would be indefinite in its duration of time.

Unfortunately there is no record evidence in the case showing the suspension of the sentence of the trial judge. In fact there is no record evidence in this transcript showing even a trial and conviction of this boy. Nearly all of the material evidence was given in parol before Judge Wikle when he heard the *habeas corpus* case at chambers. However, this much can be extracted from the record: That the judge agreed with two men, who signed Robert's bond as sureties, that if they would do so in the sum of \$250.00, they might take him out to their home where his mother lived and keep him until his father worked out

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the sentence and also the fine and costs, if he did not pay or secure the latter. They made bond as the judge required, conditioned to bring the boy into Court whenever the trial judge ordered his presence therein. Unfortunately a copy of the bond made for Robert's appearance under the directions of the trial judge is not in the record, and we only know its conditions and terms from the parol testimony we find herein. But from the testimony of the trial judge and the sureties on this bond we think its conditions were substantially as we have stated them.

It is said by the sheriff of the county, who testified in the case, and also by the trial judge that after the bond was made and the boy taken out to the home of these sureties, his case was then continued from term to term, but there is no record evidence of that fact, and the uncertainty of memory of these witnesses in regard to this matter leads us to entertain some doubts of the absolute correctness of this statement. It is probable the case was still retained on the docket, and, the judge knowing the boy was out on bond, it was passed over from term to term until in February, 1916, a period of about thirteen months. The Criminal Court of Maury County holds monthly sessions—that is, a new term begins the first Monday of each month, and the Court remains in session during that month so long as it is necessary for the transaction of its business. The stepfather of this boy remained at work on the public roads working out his sentence, fine and costs until in November, just before Thanksgiving, 1915, or a period of about nine or ten months, when he was discharged and returned home. While the boy was on bond and living with his sureties the trial judge told one of them to keep him until he called for him, which he did until in February, 1916, when the judge sent word to bring the boy into Court, which was done, and, on the 15th of February,

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1916, the Court then pronounced judgment on Robert Webb to the effect that he was tried and convicted on January 13, 1915, and he was thereupon—that is, on the 15th of February, 1916—sentenced to the workhouse for a term of six months, and to pay a fine of \$50.00, and a further sum of \$64.74 costs. After this judgment and sentence, and on the 29th of February, 1916, a mittimus was made out for the commitment of Robert Webb to the workhouse of Maury County to enforce the judgment and sentence as pronounced by the Court on the 15th of that month.

It appears from this statement that Robert was tried before a jury and found guilty on the 13th of January, 1915, and on the 15th of February, 1916, he was then sentenced to the workhouse for six months and to pay a fine of \$50.00 and a large bill of costs, and to remain in the workhouse until not only the six months' sentence but the fine and costs were worked out on the public roads. His attorneys believing that the Court had no right to indefinitely suspend the sentence as was done by the trial judge, and also believing that the Criminal Court of Maury County had no jurisdiction to try this negro boy, find him guilty and sentence him to the workhouse and to pay a fine and costs, and believing that the Juvenile Court of Maury County had exclusive jurisdiction of the boy, and for these reasons the indictment, trial, conviction, suspension of sentence and the final judgment and sentence were nullities, petitioned the Circuit Judge for a writ of *habeas corpus* to test these questions and to have all these proceedings pronounced void and the boy remanded to the Juvenile Court of Maury County to be dealt with according to Chapter 58 of the Acts of the Legislature of 1911. After hearing all of this evidence, and as we have stated it was nearly all in parol, there being no copies of the records of any of the proceedings in the case that were had in the Criminal

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Court of Maury County, the learned Circuit Judge dismissed the petition and directed the return of the petitioner to the custody of the workhouse commissioner of Maury County.

It appears that when the boy was ordered to appear in Court in February, 1916, so that sentence could be passed upon him, his attorneys then brought his age to the attention of the trial judge in a petition presented by them, but this petition, on motion of the County Attorney, was stricken from the files, and is no part of this record, and we only know that such petition was filed from the oral testimony given by the lawyer on the hearing of this petition. Further, after said petition was stricken from the files, the attorney made a motion in arrest of judgment and supported this motion with affidavits showing the true age of the boy, and that he was under sixteen years old when he committed the offense, and also when he was tried and convicted. But this motion was overruled by the trial judge, and defendant thereupon sentenced as we have stated above.

It is insisted by the learned County Attorney that the lawyers representing petitioner at the trial of this cause in the Criminal Court, learned during the trial the exact age of this boy and failed then to bring it to the attention of the Court. It is then insisted that as the boy knew his age during the trial, and the lawyers learned his age and failed to bring this fact to the knowledge of the Court during the trial, they cannot now insist upon this fact, and cannot now insist that the Criminal Court of Maury County had no jurisdiction of this boy to try him for the offense with which he was charged. We have carefully examined the testimony on this point, and these lawyers emphatically deny any knowledge of the boy's age until some days after he was convicted. There is a statement

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made by the boy himself, in answer to a cross-question, that might indicate that he had told his lawyers his age, but we are satisfied the boy did not intend to make such statement in answer to the question propounded him, and that in fact he did not tell them his age until some days after the trial. It is further insisted by the County Attorney that there was an agreement between the judge and this boy, or the sureties on his bond or his attorneys, that the judge would suspend sentencing him, let him out on bond to go home and be with his mother until his stepfather had worked out his sentence, fine and costs. There is no satisfactory evidence in the record that there was such an agreement between the trial judge and either of these men, each and all of whom testify they made no such agreement. It is remarkable that, if such an agreement was made, an entry of it on the minutes of the Criminal Court was not made at the time the agreement was entered into; but no such entry appears in this record, and granting there was such an agreement, and we do not think there was, it was in parol, made out of Court, and probably at the instance of the judge himself, after he heard of the condition of the boy's mother, and that she would be left without any protector or help while her husband was working out his sentence. Manifestly, from the testimony of the judge himself, he thought it wise and best under all the circumstances to suspend sentence of the boy and let him go home and look after his mother and the children while the husband was absent in the workhouse. That evidently was the controlling reason that moved him to let the boy out on bond.

We conclude from all we see in this record that the sentence of this boy was just indefinitely suspended, awaiting the termination of the imprisonment of his stepfather and his return home. It was suspended not only while he was

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in the county workhouse, but from November, 1915, just before Thanksgiving, until the middle of February, 1916, nearly three months longer than it was contemplated by the judge that he would be out on bond. It is likely, in fact very probable, that the trial judge forgot about the boy, and the fact that he was out on bond and his sentence suspended, and permitted him to remain out this three months until his attention was called to it by someone, though there is no evidence of such being the case, and we only infer it from his failure to have the boy come into Court promptly after his stepfather returned home. We do not think there can be much doubt, if any at all, that the suspension was for an indefinite time, depending upon how long it would take the stepfather to work out his sentence and the fine and costs imposed upon him.

This being true, one of the questions ably argued at the hearing of this cause and presented in briefs with splendid ability by lawyers for both sides is the power of the judge of a Court of record to indefinitely suspend pronouncing a judgment upon a criminal after his conviction by a jury. There is no doubt of the power of a Circuit Judge to pronounce sentence upon a prisoner at a subsequent term after his conviction, when he overlooked or forgot or by some inadvertence failed to pronounce sentence upon him at the term the jury found him guilty. A number of cases in Tennessee decided by the Supreme Court hold that, when by oversight or inadvertence of the trial judge, or the negligence or failure of the clerk to pronounce sentence on a prisoner at the term of his conviction, it may be and should be done at a subsequent term. Such are the cases of *Nolin v. State*, 6 Cold., 14; *State v. Miller*, 6 Bax., 516; *Greenfield v. State*, 7 Bax., 18; *Sharp v. State*, 117 Tenn., 537. But that is not the case we have before us now. The trial judge did not fail

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to pronounce sentence on this boy at the term the jury found him guilty because of any inadvertence or oversight; nor did he pronounce sentence on him at that term which was not entered on the minutes of the Court because of the negligence or omission of the clerk of the Court. If such had been the case there can be no doubt but the trial judge would have had the power at a subsequent term to render judgment or pronounce sentence upon the verdict of the jury. The Supreme Court has remanded cases to the lower Court to the end that sentence against the convicted party might be pronounced by the lower Court when by some oversight such sentence was not entered at the term when the prisoner was convicted. If we had a case of that kind to deal with there would be no difficulty in finding ample precedent which might be said to sustain the action of the trial judge in this case, although it is doubtful if these authorities go the length of holding that after twelve terms of Court have passed the trial judge could then at the thirteenth term pronounce a sentence upon a prisoner convicted twelve terms previous thereto.

It should have been stated that, before this boy was turned loose on his bond to go home to his mother, or about the time this proceeding was had, his lawyers had moved the Court for a new trial of the case, but upon what ground it does not appear. This motion was either withdrawn or never acted upon. Why it was withdrawn and not acted upon does not distinctly appear in the record, but it may have been on account of some kind of an agreement between counsel and the trial judge to the effect that he was to be left at large on bond until his step-father returned home, but that does not clearly appear to be true and only is a matter of inference from some facts

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appearing in the record. It does appear that the trial judge did not suspend sentence and turn this boy loose because of any desire or hope or expectation of reforming him in any way; nor because of any doubt he felt about the justice of his conviction nor of any feeling of uncertainty about the insufficiency of the indictment. He was not allowed to go at large by the judge with the intention or expectation of ultimately turning him over to the Juvenile Court. It is clear that none of these reasons influenced the judge to let the boy go home on bond. It was not for the boy's benefit or for his protection or reformation. It was simply as a matter of protection and help to his mother while her husband was in the county workhouse. No other reason seems to have had any influence on the judge in his decision to permit the boy to return to his mother. It was simply to take the place of her husband and to care for her and the small children during his absence. That fact seems clear and beyond reasonable controversy.

As we have said, what record the judge made in the Criminal Court of his action in this entire matter, we do not know as there is no copy of any record of any of the proceedings in that Court in regard to what occurred after the boy's conviction and while he was out on bond, in this Court, except the judgment of sentence pronounced upon him more than a year after his conviction, and except the mittimus given by the clerk to the sheriff of the county after the boy was sentenced. There probably would not be so much difficulty in reaching a correct conclusion in this case if a record had been kept in the Criminal Court of what the trial judge did in these matters and a copy of such record was now before us.

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The first question we will undertake to decide is whether, under all these facts and circumstances, the trial judge had the power to indefinitely suspend pronouncing sentence upon this boy at the term of the Court when he was convicted by the jury. His learned counsel ably and earnestly insists the Court had no such power, and that when it undertook thirteen months after his conviction and after twelve terms of Court has expired, to pronounce sentence on the conviction, he had then no power to render such judgment and that consequently such judgment was a nullity. It is insisted that where there is no motion for a new trial, that suspends a judgment of sentence, and where there is no appeal from the judgment of conviction or any other legal steps taken in the cause that necessitates a postponement of sentence, judgment of sentence must be pronounced at the term of Court in which conviction was had.

Section 7198 of Shannon's Code provides: "After a verdict against the defendant, if the judgment be not arrested or a new trial granted, the Court shall pronounce judgment."

In the case we now have under consideration the judgment was not arrested, and no new trial was granted, nor were any other legal steps taken that necessarily postponed a judgment of sentence upon the verdict of the jury, and in such case this section of the Code says: "The Court shall pronounce judgment." Not that the Court may pronounce judgment at some subsequent term or when it may suit his notions of what is right and proper in the case, but when there is no arrest and no new trial granted it then becomes, as we understand this statute, the imperative duty of the Court to pronounce judgment on the verdict of conviction.

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Section 7226 of Shannon's Code gives the several Courts of the State in which a cause is finally adjudged authority, either before or after final judgment, for good cause, to release the defendants, or any one or more of them, from the whole or any part of fines or forfeitures accruing to the county or State. In Section 7230, a presiding judge may, in case of conviction and sentence of a defendant to imprisonment, in all proper cases, postpone the execution of the sentence for such time as may be necessary to make application to executive for pardon or commutation of punishment; and under Section 7231, the Court may in its discretion commute the punishment of petty larceny from confinement in the penitentiary to fine or imprisonment in the county jail, or either. Under Section 7232, where a person is convicted of a capital offence and the jury which convicted him state in their verdict that they are of the opinion that there are mitigating circumstances in the case, the Court may commute the punishment from death to imprisonment for life in the penitentiary. These are all of the sections of the Code we have been able to find controlling the action of a trial judge in criminal cases after a jury has returned a verdict of guilty, and in none of them is there an intimation of power in the trial judge to suspend sentence of the convicted criminal. Section 7227 of Shannon's Code gives the Governor of the State: "Power to grant reprieves, commutations and pardons, in all criminal cases after conviction, except treason and embezzlement, subject to the regulations provided in this chapter."

Now, with a plain mandate of the law, as found in Section 7198, quoted *supra*, wherein it is said the Court shall pronounce judgment when it is not arrested or a new trial granted, had the trial judge in this particular case the power to suspend sentence of this boy indefinitely as

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was done by him as this record clearly indicates? This is a question of first impressions in Tennessee, it not having been decided in any other adjudicated case by the Supreme Court where the exact question was raised, so far as we are able to discover by an exhaustive, careful examination of the reported decisions. Nor has the industry of counsel been able to bring to our notice any reported case where the exact question was passed upon and decided by the Supreme Court. It has been before the Courts in other jurisdictions, some of which upheld the power of the judges in Courts of record to suspend sentence after a verdict of guilty has been returned by a jury, but in all the cases to which our attention has been called and which we have been able to find, the power has been exercised and sustained in cases where it was done for the reformation of the defendant, or with a hope and expectation that it would tend to change his life to the better, and upon petition of citizens interested in the reformation of the defendant.

The case decided by the Court of Appeals of New York, reported in 141 N. Y., 288, 23 L. R. A. (O. S.), 856, and cited and relied upon by learned counsel for appellee, was where sentence was suspended on account of the youth of the defendant, it being his first offense, and for the purpose of giving him an opportunity to reform his life. The suspension in that case was sustained largely on the ground that it was a humanitarian act and was done to better and reform the life of the defendant, though the Court of Appeals of New York held that a judge of any Court of record had the inherent power under the common law to suspend sentence for a proper cause, or for proper reasons therefor. In all cases we have examined where the power to suspend sentence has been upheld, they have

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invariably sustained the suspension upon the ground that a proper reason was shown why the suspension in the particular case was upheld.

The Supreme Court of North Carolina, in 115 N. C., 760, 29 L. R. A., 260, does sustain and uphold the power of a Court of record in that state to suspend a sentence when a proper reason exists therefor. That Court seems to indicate that such ruling is peculiar to the Courts of North Carolina and not sustained in any other.

The Supreme Court of Illinois, in 202 Ill., 287, reported in 63 L. R. A. (O. S.), 82, goes exhaustively and extensively into this question and reaches the conclusion that the judge of a Court of record has no power to indefinitely postpone the sentence of a criminal convicted by a jury of an offense in his Court. In that case the relator was indicted and convicted of the crime of larceny and embezzlement on the 12th of April, 1900. On the 5th day of May thereafter a motion was made for a new trial, which was continued and relator permitted to recognize in the sum of \$500.00 without surety to appear before the Criminal Court of Cook County at a later day of that term of Court, "And from day to day of each term until the final sentence or order of the Court to answer upon the indictment pending;" and he was, on his own recognizance released from custody. At the October term, 1902, his motion for a new trial was overruled and his motion in arrest continued until November 5 thereafter. The motion in arrest was finally overruled the 11th of November thereafter, and relator sentenced to imprisonment in the penitentiary. He at once applied for a writ of habeas corpus to the Circuit Court of Cook County, and when the case reached the Supreme Court of that State, after a thorough and exhaustive review of all the cases, that Court held that there was no power in the

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Circuit Judge to suspend sentence for an indefinite length of time and permit the defendant to go on his own bond. In the course of the opinion, which was rendered by Mr. Justice Carter, it was said: "There can be no doubt that a Court has the right in a criminal cause, to delay pronouncing judgment for a reasonable time, for the purpose of hearing and determining motions for a new trial or in arrest of judgment, or to give the defendant time to perfect an appeal or writ of error, or for other proper causes; but to suspend indefinitely the pronouncing of the sentence after conviction, or to suspend indefinitely the execution of the judgment after sentence pronounced, is not within the power of the Court. To allow such a power would place the criminal at the caprice of the judge. If the judge can delay a sentence one year he could delay it for fifteen years, or any length of time."

Citing from *United States v. Wilson*, 46 Fed., 748, where the defendant plead guilty to adultery, and upon his promise to obey the laws on that subject where it was ordered that the sentence be suspended until further orders of this Court, and that said defendant be released and his bail exonerated, that Court held that such entry was error, and that it was beyond the power of the Court to suspend sentence for an indefinite time, and that it could not correct such error at another term.

In the case of the *People v. Blackburn*, 6 Utah, 647, one Dodds was found guilty of voluntary manslaughter, and on his motion, by an order entered reciting that good and sufficient reasons were made to appear therefor, sentence was suspended during good behavior. The Supreme Court of Utah, in passing upon this order, said: "It is the duty of the Court to keep control of the case and within a reasonable time to proceed to give judgment and in doing so to exercise such discretion as the statute governing the

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particular offense commits to the Court. The authority to hold or release parties from a conviction for crime is not given to the Courts, but belongs to the pardoning power."

The question was before the Supreme Court of Michigan in *Weaver v. People*, 33 Mich., 296, and that Court held adversely to the power claimed by the County Attorney in this case.

In the case of *Neal v. State*, 104 Ga., 509, 42 L. R. A. (O. S.), 190, the Supreme Court of Georgia says, "The power to indefinitely postpone the punishment prescribed by the law, whether exercised by suspending the imposition or by suspending the execution of a sentence, is the power to perpetually prevent punishment"—, a power which, under such provisions as are found in the constitution of this State does not exist in the Courts.

The Supreme Court of North Dakota, in 5 N. D., 180, held that the Courts at common law had no power to stay sentence after conviction. It was said by that Court: "An indefinite suspension of the sentence prescribed by law is a *quasi* pardon, provided the prisoner be discharged from imprisonment. No Court in the State has any pardoning power. That power belongs exclusively to the governor."

In the case of the *People ex rel Smith v. Allen*, reported in 41 L. R. A., 473, where the relator plead guilty to the charge, and judgment upon his plea was stayed and he allowed to depart on his own bond, it was held that it was the duty of the Courts in criminal cases, upon a conviction or plea of guilty, to pronounce judgment at that time unless upon motion for a new trial, in arrest of judgment or for other cause the case is continued for further adjudication and the defendant, by recognizance or being held in custody, required to continue to answer the charge, and if they fail to perform that duty by discharging the prisoner or permit him to go indefinitely, their power and jurisdic-

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tion over him cease, and a subsequent sentence is without judicial authority."

This power is denied by the Supreme Court of Iowa, as is shown by the *State of Iowa v. Claus Voss*, 8 L. R. A. (O. S.), 767.

The question is ably discussed by the Supreme Court of Michigan in the case of *People v. Cummings*, reported in 14 L. R. A. (O. S.), 485, and in a note to that opinion the author says: "The weight of authority is now against the power of the courts to suspend sentence for good behavior except for short periods pending the determination of motions or until considerations arising in the cause after verdict." Citing quite a number of cases in support of that statement of the rule so announced by the commentator.

The question was before the Supreme Court of Idaho in the case of *Re Chris Peterson*, reported in 33 L. R. A. (N. S.), 1076, and was decided by that Court against the power of indefinite suspension.

We might cite additional authorities from other jurisdictions against the right and power of a trial judge to indefinitely suspend a sentence of a person convicted by a jury of a crime, but think it unnecessary to do so. We have stated that the exact question was never passed upon by the Supreme Court of Tennessee, and that is true so far as we are able to discover, but the exact question was discussed by Mr. Chief Justice Neil in *Spencer v. State*, 125 Tenn., 66, and in the opinion delivered by him it was stated that no such power existed in this State. He states that it was undoubtedly the practice at common law to suspend the entry of a judgment in criminal cases after a verdict on a plea of guilty during the pleasure of the Court and with the consent of the defendant, subject to the power of the Court to cause to be entered a judgment on the

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verdict or plea at a subsequent term whenever the judge deemed the interest of justice required it. He quoted from Lord Hale that, under the common law as administered in England, sometimes a judge reprieves before judgment when he is not satisfied with the verdict, or the evidence is uncertain, or the indictment is insufficient, or doubtful whether within clergy; also when favorable or extenuating circumstances appear, and when youths are convicted of their first offense. Mr. Justice Neil says this rule had its origin when the English Courts had no power to grant new trials, and when their judgments were not subject to review on the facts by any higher Court, and that this was the reason of the rule, which was humane, and, as he says, in a sense necessary. But the learned judge says such rule is not necessary in this State where a new trial may be granted or the judgment arrested, or the facts of the case reviewed on appeal by a higher Court. While admitting that this rule is adopted and enforced in many of the States of the Union, and in many of those States it is not adopted and enforced, the learned justice says: "Everywhere it is conceded the Court has power to suspend judgment for a limited time so as to enable the prisoner to move for a new trial or in arrest of judgment, or to enable the judge to better satisfy his own mind as to what the punishment should be, and on other similar grounds looking to the better enforcement or to the safeguarding of the rights involved in the particular controversy." After citing and commenting on the several cases in other jurisdictions upholding and sustaining the rule, and jurisdictions where the power is denied, Mr. Chief Justice Neil says, finally, as to the rule in Tennessee: "While in Tennessee we have held that when by oversight judgment has not been entered in a criminal case upon the verdict at the trial term, it may be and should be at a subsequent term," citing

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the case, "we have never recognized the common law practice of an indefinite suspension of judgment—and rightly. The reasons assigned for the practice by Lord Hale do not exist here. Provisions are made by our statutes not only for the granting of a new trial by the trial Court, but also for a full review of the facts and the law on appeal to this Court. So far as concerns the last reason assigned for the rule, the duty of leniency to youths for their first offense, this is fully governed by our statute which provides as follows:" Citing Shannon's Code, Section 7236.

The question involved in *Spencer v. State* was the power of the Circuit Judge to suspend the execution of a sentence after it had been pronounced, and this power was denied and held not to exist in that case. And in discussing the existence of such power the learned justice digressed to the extent of also discussing the power to indefinitely suspend a sentence at the term of Court when the jury had rendered a verdict of guilty, and it was held by him, speaking for the Court, that no such power existed, and the reasons given why it did not exist in Tennessee seem to us conclusive against such power. If, as Lord Hale says, the reason for the exercise of the power was in some cases where the judge was not satisfied with the evidence or the indictment was insufficient, or there were extenuating circumstances, or where a youth was convicted of his first offense, none of these reasons for the rule exist in Tennessee now, and the reason of the rule ceasing, the rule itself was abrogated and no longer exists.

We do not understand from this record that any of the reasons given by Lord Hale for the power influenced the trial judge in suspending sentence in this case. Although this boy was a youth, and it may have been his first offense, yet manifestly that was not the reason why he suspended the sentence. As stated, sentence was suspended simply

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for the benefit of the mother of the boy, and to allow her son to be with her and take care of her during the absence of her husband. We have reached the conclusion that the trial judge had no power to indefinitely suspend the sentence as was done in this case, and that he had no power or jurisdiction to render a judgment of sentence on the verdict of the jury thirteen months after the jury had found him guilty, and that such judgment of sentence was a nullity.

There is another and a much more serious question urged against the trial, conviction and sentence of this negro boy, and which goes to and challenges the validity of the entire proceedings in this case from the time he was arrested in August, 1913, until he was brought before the Circuit Judge on the writ of *habeas corpus*, and that is that the Criminal Court of Maury County was wholly without jurisdiction to try this boy upon the charge of illegally selling intoxicating liquor, or upon any other charge, unless it be that of rape or a charge of murder in the first and second degree.

The Legislature of 1911, by Chapter 58, page 111, of the published general laws of that Legislature, created a Juvenile Court for each county in the State and placed jurisdiction of what the Act terms delinquent children under the age of sixteen years who violate any of the laws of the State, or of any city or town ordinance, etc., under the exclusive jurisdiction of such Court. The County Judge of each county in the State is made the judge of such Juvenile Court, and what children come under its provisions and are subject to the jurisdiction of that Court are very fully and clearly set out and defined in the first section of that Act. The words, delinquent children, as used in the Act, are defined in that section, and it is said these words "shall include any child under the age of sixteen years who violates any of the laws of the State or any

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city or town ordinance, or who is incorrigible, or who is a persistent truant from school, or who associates with criminals or reputed criminals, or vicious or immoral persons, etc. Section 2 provides a County Judge or Chairman of the County Courts of the several counties in this State shall have original, exclusive jurisdiction of all cases coming within the terms of this Act except in those counties embraced in Section 18 hereof, such cases to be heard and determined by the judge or chairman of said Courts.

This boy was under sixteen years old when he was arrested, and also when he was tried, and, under the provisions of Section 2 of the Act, the County Judge holding the Juvenile Court of Maury County had original and exclusive jurisdiction of him, and of the offense with which he was charged.

The Act is voluminous, and has many sections and many provisions in it. It provides what disposition the County Judge shall make of any child coming under the jurisdiction of the Juvenile Court and brought before him as a delinquent child. We do not deem it necessary to quote at length from this Act, except Section 11, which provides that no Court or magistrate shall commit a child coming under the provisions of this Act to any jail, lockup or police station for punishment for any offense committed under this Act.

The Supreme Court placed a construction of the foregoing provisions of the Act of 1911 in connection with the entire Act and its evident policy is that, when the arrest of plaintiff in error was made, though not by order of the Juvenile Court, that Court acquired immediate jurisdiction over his person," and then this part of Section 1 of the Act is quoted: "When jurisdiction has been acquired over the person of a child, such jurisdiction shall continue for the purposes of this Act until the child

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shall have attained its majority." And although the boy had been tried and convicted by the Criminal Court of Hamblen County, the Supreme Court said that in its opinion the Juvenile Court of that county still had jurisdiction to deal with the boy at that time, though he was then beyond the age of sixteen years. Further in the opinion the Court said: "In other words, in contemplation of the Act of 1911, the custody which the Circuit Court and its officers have had of the person of plaintiff in error has been held for the Juvenile Court, and it is the duty of that Court now to deal with plaintiff in error as if he had been held in custody by it or its officers, since the alleged date of the commission of the offense against the State law."

We fully agree with this interpretation of the Act of 1911 as placed upon it by the Supreme Court in *Sams v. State*. It then follows that, although the age of the boy was not known when he was arrested, yet as he was in fact under sixteen years old, and a delinquent child when he was arrested on the magistrate's warrant, the Juvenile Court then immediately acquired jurisdiction over his person, and, under the quoted part of Section 1 in the opinion, the jurisdiction of that Court continued for all the purposes of the Act until this boy attained his majority. His custody by the officers of the county of Maury, and while under the custody of the Criminal Court of that county and its officers was held, according to this decision, for the Juvenile Court, and he is still held for that Court, as much so as if he had been arrested by order and direction of the judge of that Court. It makes no difference that his age was not known when he was arrested. The fact that he was a delinquent child when arrested, or when he committed the offense, gave the judge of the Juvenile Court original and exclusive jurisdiction over him, and this jurisdiction continued, notwithstanding he arrives at and passed

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the age of sixteen years, until he arrives at the age of twenty-one years. During all that time he is under the jurisdiction and subject to the orders and control of the Juvenile Court of Maury County.

Now, it is said the Criminal Court knew nothing about his age when it had him in custody, and when he was tried by it, and that he cannot now come up and claim the benefit of this Act of the Legislature. Whether he wants to claim the benefit of the provisions of that Act or not, the Juvenile Court has exclusive and original jurisdiction over him until he is twenty-one years old, and is entitled under that Act to the custody and control of him. He cannot divest that Court of jurisdiction of his person until he is twenty-one years old by concealing, or even imposing upon the Criminal Court of Maury County and permitting himself to be there tried as a common criminal and violater of the laws of the State. He cannot give his consent to that Court's jurisdiction over him, because the law makes it the imperative duty of the judge or chairman of the County Court to take original and exclusive jurisdiction over him when he violates the laws of Tennessee, and gives such judge or chairman continuous jurisdiction of him until he arrives at the age of twenty-one years. By no kind of consent or agreement or contract can he or his attorneys denude or divest the Juvenile Court of Maury County of original and exclusive jurisdiction over him. It makes no difference that he is now past sixteen years old, and it would make no difference if he had been past sixteen years old when he was tried and convicted if in fact he was a delinquent child under sixteen years old when he committed the crime. The commission of the crime while under sixteen years old gives the judge or chairman original and exclusive jurisdiction over him until he is twenty-one years old, under the Act of 1911, and no other Court

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can take away from the Juvenile Court the jurisdiction the law vests in it. Neither can the judge of the Criminal Court by any kind of agreement with the delinquent child or his attorneys or his friends deprive the Juvenile Court of his original, exclusive and rightful jurisdiction of this boy from the time he committed the offense until he is twenty-one years old.

These are the conclusions we have reached, and it results that the Court was in error in dismissing the petition for writs of *habeas corpus* and remanding this boy to the custody of the workhouse commissioner of Maury County. The boy will be remanded to the judge or chairman of the County Court of Maury County acting as judge of the Juvenile Court of that county, to be dealt with in accordance with the Act of 1911.

F. J. CAHILL ET ALS. V. EDWARD F. THORN ET ALS.

Writ of certiorari denied by the Supreme Court, 1917.

1. CHANCERY PRACTICE. *Jurisdiction to determine existence of a will.*

A court of chancery entertaining a bill to recover possession of a parcel of realty has jurisdiction to determine whether a will averred to be the source of title was executed and probated.

2. SAME. *Pendency of such suit does not deprive party of right to contest.*

Neither the pendency of such litigation nor the raising of the issue of will or no will deprives the parties urging the invalidity of the instrument of the right to go into the

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county court and institute a contest. But until set aside, the will must be assumed by the courts of equity of the state to be valid and binding.

3. **HOMESTEAD.** *The execution of will by husband does not impair homestead right of widow nor put her to election or dissent when.*

Where the husband was the owner of one small piece of real estate only which he occupied as a homestead and devised the same to a son without mentioning his wife or giving her other property or making provisions such as required her to elect, the widow is entitled to homestead and is not required to enter her dissent to her husband's will as a condition precedent to her rights.

4. **TAXES ON HOMESTEAD.** *Duty of widow to pay. Right of remainderman to reimbursement.*

It is the duty of the widow to pay the taxes assessed against the homestead and if a remainderman pay the same, to protect the entire parcel of land, he is entitled to reimbursement from the widow. But the remainderman cannot by purchasing the land at a tax sale assert ownership thereof to the exclusion of the homestead tenant.

FROM SHELBY COUNTY.

Appealed in error from the Chancery Court of Shelby County, Part 1. F. H. HEISKELL, Chancellor.

W. H. GRIMES, and T. E. BELL for Complainants.

A. H. KORTRECHT, BELL, TERRY & BELL and D. B. NEWSOM for Defendants.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

MRS. CAHILL was formerly the wife and the widow of one Edward W. Thorn, who died in Memphis about 1895,

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leaving two sons, one by Mrs. Cahill and the other by a first wife. Thorn was the owner of a small piece of real estate in Shelby County worth now about \$2,000.00. Mrs. Cahill and Thorn (she married Cahill years after the death of Thorn) continued to reside upon this property as a homestead, and was upon it when the original bill in this case was filed by her son and herself in April, 1915.

In her bill she averred that her husband, Thorn, had died the owner of the real estate described, leaving the two sons above mentioned. Complainant and her own son sought a sale of the real estate, which she averred descended to Thorn's two sons encumbered with her homestead and dower. It was alleged that the property was not susceptible of partition in kind, and that she herself desired that her homestead and dower interests be valued and allotted to her out of the proceeds of sale.

One Critchell was also made defendant. It was averred that he was the possessor of a tax title to the property, but that it was void for certain irregularities. The prayer was that the deed be decreed to be void and removed as a cloud.

Edward F. Thorn filed an answer and cross bill. In his answer he virtually admitted all the facts, but denied the conclusion that either Mrs. Cahill or her son had any interest in the property. This defendant also assailed the tax deed of Critchell. As cross complainant Edward F. Thorn averred that just before the death of his father the latter had made and published a will devising to him, Edward, his entire estate excepting one dollar to his half-brother, the complainant, Frank Solomon. It was alleged that this will had been duly admitted to probate in common form, and was on record in the Shelby County Probate Court. Cross complainant prayed for an adjudication that he was entitled to the property and its possession as devisee of his father.

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To this cross bill Mrs. Cahill and son responded denying the existence of the will and its execution, and also all of its provisions that were mentioned by Edward F. We have carefully analyzed this answer and find that the only issue presented by it was as to whether Edward W. Thorn had in fact made and published a will. It is observable that neither fraud, forgery, nor incapacity was alleged.

Before the final termination of the case Edward F. Thorn and Critchell entered into an agreement whereby the latter was to release and quitclaim to the former all rights by him under the taxtitle before mentioned.

The cause went to proof, and much evidence was taken. After matters had been at issue for several months, complainants moved the Court for a continuance, to the end that they might institute a will contest in the Circuit Court. The Chancellor declined to grant the continuance, holding that he had jurisdiction to determine the issues raised. Additional evidence was taken. Upon final hearing the Chancellor dismissed the bill of complainants and sustained the cross bill of Edward F. Thorn, decreeing to him the absolute title and right to possession of the property involved. Complainants have appealed and assigned numerous errors which may be condensed into about three.

We shall state briefly the admitted facts before taking up the issues presented. It is undoubtedly true that the elder Thorn was the owner of the small tract involved in litigation, that he occupied it as a homestead and partly as place of business, that Mrs. Cahill was his wife, and became his widow, that her co-complainant Frank was the son of her husband, that the defendant was the other son; that while she and the elder Thorn were not living together at the time of his death because of disagreements, she returned to the home about the time of or immediately after his death and continued to occupy the place for the

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ensuing twenty years, and until the filing of this bill. It seems to be equally true that she had no knowledge until about two years before the beginning of this litigation of the existence of any will, nor was she aware of its probate until this litigation was begun.

The first question to be noted is as to whether the Chancellor was in error in not granting a continuance for the purpose of allowing the institution of a will contest and also in retaining the case, and himself determining whether a will existed. Our first observation is that complainants originally submitted to the jurisdiction of the Court; in the next place they could have instituted the contest notwithstanding the pendency of this litigation. And thirdly the Chancellor undoubtedly had the right under the authorities obtaining in Tennessee to determine the *factum* of the execution of a will and its subsequent probate. We need do no more than refer to the authorities to this effect. *State v. Goodman*, 133 Tenn., 380; *State v. Lancaster*, 119 Tenn., 638; *Greer v. Canada*, *idem* 17. As we observed before the issue was as to whether the will was executed. After the ascertainment of this fact and its subsequent probate the right of the devisee to the property was established against all the world until that probate was set aside in a regular way.

The proof clearly established the execution of the will and its subsequent probate in common form. While there may have been some secrecy about it, the circumstances are not such as suggest any fraud, either in the execution of the instrument or in its probate or in keeping Mrs. Thorn ignorant of its existence. The result of decreeing that Edward F. Thorn was entitled to the whole of the lot in fee to the exclusion of his brother necessarily follows. But notwithstanding the execution and probate of this will, the homestead right of Mrs. Thorn was not affected.

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We shall treat one of the assignments of error as sufficient to raise this question.

The rule is now well settled that where a testator has a homestead only and devises it, the widow is not required to elect or dissent in order to claim her rights, especially when she is not mentioned in the instrument, and when there is no suggestion that the husband put to her any situation that required election. *Chamness v. Parrish*, 10 Cates, 744. This is in accordance with the constitutional provision that the widow cannot be deprived of her homestead by any instrument executed by the husband alone. But the rule as to dower is different. Having failed to dissent, she loses that right. *Rowlett v. Rowlett*, 8 Cates, 466.

Mrs. Cahill and son have enjoyed the rents and profits of this property since the death of her husband; and both as a matter of law and of right they should be required to bear the tax burden. Edward Thorn cannot assert any superior right against his stepmother by virtue of his acquisition of Critchell's taxtitle other than that of reimbursement. *Tisdale v. Tisdale*, 2 Sneed, 596. This act inured to all parties interested in the land.

It results from the foregoing that the decree of the learned Chancellor will have to be modified to the extent of adjudging that Mrs. Cahill is entitled to the homestead right, burdened of course with all taxes that have heretofore accrued, including the sum legitimately due Edward Thorn for relieving the land of the claims of Critchell. The cause will be remanded to the lower Court with directions to decree Mrs. Cahill her homestead, to be allotted in kind in the absence of an agreement between Edward F. Thorn and herself as to the purchase or the selling of the land and the computing of her homestead right in money. The costs of this Court and of the lower Court are to be

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divided thus, one-half by Edward F. Thorn and the other half by complainants. It is of course understood that the tax obligations are to be deducted from the value of Mrs. Cahill's homestead.

MARTIN OLIVER AND WIFE v. WILL TURNER AND WIFE.

WILLS. Lapsed devise. Death of devisee before testator.

In case of the death of a devisee without issue and before the death of the testator a devise lapses and the property, in the absence of a residuary clause in the will, passes according to the laws of descent and distribution.

FROM CARROLL COUNTY.

Appealed from the Chancery Court of Carroll County.
J. W. Ross, Chancellor.

J. W. MOODY and J. T. PEELER for Complainants.

P. W. MADDUX for the Defendants.

SPECIAL JUSTICE SANSOM delivered the opinion of the Court.

THE bill in this case was filed on the 17th day of December, 1912, for the purpose of having construed the will of Robert Green, deceased, and having adjudged and settled the rights and interests of parties in respect of the property left by the testator. The principle insistence of the bill out of which the matter immediately in hand and

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the questions directly to be determined grow and arise is a certain devise of real estate made by the testator to his son.

The will in question was executed, according to the record, on the 27th day of September, 1881. The testator died in September, 1902. It appears that he left surviving him his widow, Caroline Green, who afterwards intermarried with and became the wife of the defendant, Will Turner. Really, the settlement of the questions at issue depends to a degree, if not altogether, upon the construction to be given to the second, third, fourth and fifth clauses of the will. These clauses are in the following words:

“2nd. I give and bequeath unto my wife Caroline Green the tract of land upon which I now reside, and which was conveyed to me by Aron Lipe, and bounded on the north by the tract of land that I purchased from Sam Allen, on the east by the same, and a tract of land that I bought from McMackins, on the south by the said McMackins tract, and on the west by the land now owned by Wilson Hodge, containing by estimation 138½ acres more or less.

“And also that portion of the McMackins tract of land that immediately south of the above described tract, and bounded as follows: Beginning on the South east corner of said tract, thence south to the south line of the McMackins tract, thence west with the line of the same to the south west corner of said tract, thence north to the south west corner of Aron Lipe or home tract, thence south with the said line of the same to the beginning, containing about five or 6 acres more or less, to have, hold, use and occupy said tracts of land as homestead with all the rents and profits of the same for and during her natural life or widowhood.

“3rd. I give unto my wife the following property absolutely to-wit: All of the money that I may have on hand

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at the time of my death, and also my bay mule that has a lump or wart on her side. I also give unto her the following property for and during her natural life or widowhood to-wit: all of my farming tools, household and kitchen furniture, two other good mules of her own selection, my two horse wagon and gear, all of my hogs and sheep, two good milk cows and calves of her own selection.

"4th. I also give unto my wife and those of my family who may reside with me at the time of my death one year's support for herself and family to be taken from the crop growing or on hand at the time of my death, said year's support shall be laid off by commissioners appointed by the County Court at the time of the probating of my will.

"5th. I further direct that at the death or marriage of my wife the property herein bequeathed to her by the 2nd and 3rd clause of this my will shall go to my son Robert E. Green, and be inherited by him."

It will be noted by the fifth clause of the will above quoted that the testator's directions are that at the death or marriage of his surviving wife the property bequeathed to her under items two and three of the will shall be given to his son, Robert E. Green, and it appears from the record that Robert E. Green nominated under the fifth clause as the beneficiary of the remainder interest in this real estate subject to the life estate of the wife of the testator died some ten years approximately prior to the date of the death of the testator and left surviving him no children or heirs at law. The question to be determined in the case is who takes the property under that state of facts.

There was a demurrer in the Court below to the bill by which the position was assumed that under the facts stated, that is, the son to whom was devised the remainder interest in the real estate subject to the life estate of the

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wife of the testator, having died, that the wife herself took the property, while the contention of the complainants and other heirs at law of the testator who filed the bill is that the devise lapsed, the devisee having died before the testator and having left no issue. The lower Court held that the donation to Robert E. Green lapsed by reason of his death prior to that of the testator, with the result that the property covered by the devise subject to the homestead and exemption rights of the widow passed under the statutes of descent and distribution.

The Chancellor held second, that as to that part of the bill seeking to have adjudged the loss of the widow of her right of homestead in her husband's realty by reason of her second marriage, was not well taken, and the demurrer was sustained to the bill in that regard, but as to that part of the demurrer raising the question that the testator's wife because of her failure to dissent from the will elected to take thereunder lost her right of dower in her husband's estate, the demurrer was overruled.

There was an answer filed thereafter by the parties to the bill raising the issues and the final decree was passed by the Court upon oral testimony heard in open Court. Whereby the Court adjudged that the defendant Caroline Turner under the will of her husband, Robert Green, became the owner of the land in controversy and described in the bill as containing 138½ acres and five or six acres as a homestead simply, being less in value than \$1,000.00 at the time of the death of the testator and at the death of the defendant Caroline Turner this land will go as under the statutes of descent and distribution.

Exception was had to this decree and from it this appeal is being prosecuted and errors have been assigned, three in number, but the real gist of the first and second

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errors assigned is that the Chancellor was in error in his holding that the beneficiary, Robert Green, having died before the testator without issue, the devise of the real estate to him in remainder lapsed and the land went under the statutes of descent and distribution, and that his wife and widow only took the same as homestead and not in fee.

As stated, the beneficiary, Robert E. Green, the son of the testator, died some years before his father, and he died childless and without issue. Under these facts and circumstances the law seems to be settled in Tennessee that the devise lapsed.

The general and well settled rule in all cases not coming within the scope of the statutes is that all devises and legacies shall be deemed lapsed if the devisee or legatee dies in the lifetime of the testator, without children or issue. *Dixon v. Cooper*, 88 Tenn., 182.

And this holding is based upon the authorities cited in support thereof: 4th Kent, 641; 1st Jarman on Wills, 617; *Morton v. Morton*, 2d Swan; 3rd Meigs Digest, Section 2750; 2 Redfield on Wills, Section 50, 484, and to that we might add Underhill on Wills, Vol. 1, Sections 226, 439.

This really covers the entire scope of controversy embraced within the assignments of error. The Court is of opinion that there was no error in the decree of the Chancellor and the same is affirmed and the cause remanded to the lower Court for further and appropriate proceedings therein in accord with the Chancellor's decree.

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**ANNIE BOWMAN AND HUSBAND V. HOME MEDICINE
COMPANY.**

Affirmed by the Supreme Court, 1917.

1. **FRAUD AND DECEIT IN SALE OF SHARES OF STOCK. *Repudiation. Must be promptly made.***

A party claiming to have been defrauded in the sale of shares of stock in a corporation must repudiate the transaction with promptness after the discovery of the fraud in case a rescission be sought.

2. **CORPORATIONS. *Sales of stock by agent. Liability of directors for fraud committed.***

In the absence of evidence showing knowledge of or specific employment by the directors of an agent engaged by the corporation to sell stock for it, the directors are not liable to a purchaser of stock for fraud committed by the agent in making the sale.

3. **SAME. *Principal and agent. Party agent of corporation.***

A person engaged in the usual way by a corporation to transact business for it is the agent of the corporation and not of the directors and the directors in the absence of knowledge and active participation cannot be held personally liable for the fraudulent or wrongful acts of the agent.

4. **INSOLVENT CORPORATIONS. *Mortgage by insolvent but going concern to secure advances to enable the corporation to pay its debts.***

Although a corporation be insolvent in the sense that its liabilities exceed its assets, the directors still have authority to mortgage the assets for the purpose of consolidating the indebtedness of the corporation and free it from embarrass-

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ment when done in good faith and when it is a going concern with reasonable prospects of emerging from difficulties and reaching a sound basis.

FROM DAVIDSON COUNTY.

Appealed from the Chancery Court of Davidson County,
Part I. JOHN ALLISON, Chancellor.

KNIGHT & BEASLEY for Complainants.

H. H. BARR and PENDLETON & DEWITT for Defendants.

MR. JUSTICE MOORE delivered the opinion of the Court.

COMPLAINANT filed this bill the 13th of February, 1913, against the medicine company and the members of the board of directors of said company, seeking to rescind a contract of purchase of shares of stock in said company and to recover \$500.00 paid by her for the stock. The Chancellor granted the relief sought and defendants have appealed and assigned errors.

There are three assignments, the first one going to the decree of the Chancellor in favor of complainants and against the company and the members of the board of directors, granting her a decree for \$595.50, that being the amount paid by her for stock and interest thereon. The company does not appeal from said decree and, consequently, the decree against it remains in full force and effect. This decree was pronounced against not only all of the directors before the Court, but also against three defendants against whom the bill had been dismissed by complainant, and it is conceded that the decree as to them

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is error. The principal contention in this Court is as to the liability of the directors to the complainant for the money she paid for stock in the defendant company. There is also a strong controversy between complainant and the defendant Ryan as to which of them has the prior or better right to have the property of the company applied in payment of their respective debts. The deposition of Mr. Schropshire, taken by the defendant Ryan, was excluded by the Chancellor and not read as evidence in the case, and his action in this respect is likewise assigned as error.

During the progress of the case and before it was ready for trial an agreement was entered into between the attorneys for complainants and defendants, which is styled, "The Agreed Order," which the Chancellor undertook to construe and in construing it held that the defendant Ryan had agreed that complainants had a superior and prior right over him to have the property attached, sold and the proceeds applied to the payment of complainant's debt before any part of it could be decreed to be appropriated to the payment of Mr. Ryan's indebtedness against the company.

We do not think it important to take up these assignments in detail, but will dispose of all of them in the course of the opinion.

A brief statement of the facts shown in this record is necessary in order to adjudicate the legal questions raised by the assignments. Just when the Home Medicine Company was organized does not clearly appear from the record. It is a Tennessee corporation, chartered under the laws of this State and organized probably in the early part of the year 1911, the object and purpose of its incorporation and organization being the manufacture and sale of

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certain named medicines, commonly called patent medicines, there being three, four or five different medicines manufactured by it. It does not clearly appear whether there was any actual *bona fide* capital stock subscribed and paid by the shareholders or not, but it does appear that the company issued what is called treasury stock, and sold such stock to the amount of about \$21,000.00. Some of it was sold above par, but manifestly the principal part of it was sold at par, and probably some of it for less than par. It seems that the principal stockholders of the company were some of the best business men of Nashville, and nearly all of them lived in that city. Some of them lived in other counties in the State, while the defendant Ryan lived in Murray, Kentucky, a distance of over 125 miles from Nashville. He did an extensive mercantile business in that town and came to Nashville occasionally to attend a stockholders' or directors' meeting of the company. This company began business some time in the early part of 1911 and continued manufacturing and selling its medicines up to and for some time after the bill in this case was filed. Like all new corporations, and especially those chartered and organized for the purposes for which this one was chartered, its progress was necessarily slow and the profits from its business small, if they amounted to anything. The largest part of the proceeds of the sale of the treasury stock was used in advertising the products of the company, in paying the expenses of salesmen to put it upon the market and to get it before the public and in operating expenses. It seems that these expenditures consumed the principal part, if not all, of the money realized from the sale of stock. The extent of the sales of its medicines and the value and amount thereof during the year 1911, cannot be determined from the proof in

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this case, and whether such sales were large or small we do not know. The medicines made by the company being new to the public, such sales must necessarily have been small. The business was operated by the company during the year 1911 under the direction and control of a board of directors which was composed of the defendants to this bill. The defendant Ryan bought ten shares of stock from one of the salesmen in the spring of 1911, paying therefor par value less a small commission discount he received. He again bought ninety shares of stock at par less such commissions in the fall of 1911. In April, 1911, he was elected a member of the board of directors and served as such until April, 1912, and thereafter was not connected with such board, but continued to remain a stockholder in the company, still retaining his 100 shares of stock. He appears to have been a man of some wealth, and probably of large business experience.

The complainant, Mrs. Bowman, and her husband had lived some six or eight miles in the country from Waverly, in Humphreys County. She owned a tract of land which she sold and from which sale she realized something over \$4,000.00, and after paying an indebtedness against it she had remaining of the proceeds of such sale between twelve and fifteen hundred dollars, or probably more. After the sale of their farm she and her husband moved to East Nashville and took up their residence there. Her husband had a brother who was the chemist of the defendant company, and worked for it as such since its organization and continued in its employ until the bill in this case was filed. He seems to have been a man of some intelligence and understood the nature of the business the company was doing. Mrs. Bowman had used some of the medicines made by the company in her family and was well and favorably impressed with it. Believing it to be

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a good remedy for certain ailments, she evidently conceived the idea in her own mind that this company had a bright future before it and would probably, like the Paris Medicine Company, which was organized in Paris, Tennessee, make its stockholders millionaires. She does not claim that anyone had talked the company's stock up to her, or put it into her mind to buy it before she went to the company's office to investigate it and with the intention, if satisfied, of investing some of her surplus money in this stock. After she moved to Nashville and about the 16th of February, 1912, she and her husband went to the office of the company where his brother worked and inquired of him about the value of the stock, and whether it would prove to be a good investment. Dr. Bowman, as the brother of complainant's husband is called in this record, claimed he was not familiar with the financial condition of the company, but offered to introduce complainant to one Will Harris, who was the stock salesman, and who Dr. Bowman said was reliable and trustworthy, and said to her that Harris could tell her all about the company and its financial condition. Harris was brought into the office by Dr. Bowman and introduced to her, when she told him that she had a little money she wanted to invest where she would not lose it, when Harris replied, "The Home Medicine Company was as safe and safer than the bank, that he would rather have his money in there than any bank in Nashville." She told him she wanted to know about the business, and that her husband's brother had spoken to her about taking stock. "I wanted to know exactly about the business, and he said the business was all right, it was going fast. I said I had some money and wanted to put it where it would be a safe investment and make me some interest, and he said that was the very place I wanted, and he went on to say the company had decided not to sell any less than \$500.00

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worth of stock any more. I told him then I didn't want any stock. I didn't want to invest that much money in that kind of a business. He said it was as safe as any bank in Nashville. I told him I didn't hardly think it was. He said, 'Well, I would rather have what money I have in this place than in the bank.' He said the capital was good, the directors were all good standard men." Without quoting literally her evidence, she claims that Harris told her they only had \$1,000.00 worth of stock to sell, and only wanted just two more stockholders. She said that was too much in that kind of a business, when he commenced talking about a woman up in Kentucky drawing \$1,500.00 a year on an investment of \$500.00 in a fig medicine company, and said she was making \$12,000.00 a year on it. She says she studied the matter over and thought that it was a pretty good investment. Harris told her the business of the company was fine, that it was extending and the books would show up that it was growing every day. That if she wanted the stock she had better take it at once, as they were going to close out and only wanted two more stockholders, and then said, "Mrs. Bowman, if you decide to take this stock, any day you want your money you can get it out of here." After she declined to buy \$500.00 of stock, Harris proposed to let her have \$200.00 of it, which she agreed to purchase. A certificate of stock calling for \$200.00 of the stock in the company was then issued to her and signed by the proper officers, delivered to her when she gave her check for that amount of money and went away apparently satisfied with her trade. On the 21st of February, five days after the first purchase, Harris and Dr. Bowman went out to her house in East Nashville and sold her \$300.00 more of the stock, for which she paid \$200.00 in cash and sold the company a horse, the value of which was estimated at

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\$100.00, when that much stock was issued to her, making her purchase altogether amount to \$500.00.

We have given in substance and in the main literally the representations and statements Mrs. Bowman says Harris made to her about the company at the time she made this purchase. She testified that in May following the time she bought the stock she "began to feel a little bit of uneasiness about it." Just what caused this little bit of uneasiness in her mind she does not state. We infer from what she says that her husband attended meetings of the shareholders between the date of her purchase and the time when she began to feel this little bit of uneasiness, and probably was present at some meetings of the board of directors, and it may be that what he learned there created this uneasiness in her mind about her trade. However, she did attend a meeting of either the shareholders or the board of directors in August, 1912, and says in regard to what she learned at such meeting: "I found it wasn't no good; all busted. I went to Mr. Harris that day and told him what he said to me about any time I wanted my money back all I had to do was to ask for it. I told him the company wasn't any good, that it wasn't what he recommended it to be. You see, that day that the meeting was, they all come to the conclusion that they would put it up for sale, they would give thirty days' notice, you know, and let it go to the highest bidder. So it was sold the 19th day of September, and brought, I think it was, \$1,950.00. The Nashville people and the Kentucky boys had a man there bidding on it."

It appears from other evidence in the record that in the spring and summer of 1912 the company was short of funds with which to operate its business, and the board of directors had a number of meetings which were attended by most if not all of the shareholders. At these different

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meetings its financial condition was discussed as well as its prospects of future success. Some of the shareholders were not only hopeful but very sanguine of ultimate success. It would seem that Mrs. Bowman shared this feeling until she attended the August meeting, when she "found it wasn't no good; all busted." Being satisfied it was no good and all busted at that time, she went to Harris and demanded a return of her money and "told him the company wasn't any good, that it wasn't what he had recommended it to be." She does not claim to have made this statement to any other member of the company or to any of its officers, nor to have demanded of the company or any other stockholder or officer therein a return of her \$500.00. It does appear from the record that the majority of the stockholders thought when attending this meeting in August that the interest of the company would be best subserved by a sale of the property and by the use of the proceeds of such sale in liquidating its indebtedness, and the majority of its shareholders decided to offer its property for sale, including its formulas, franchise and, in fact, all of its assets. There was a strong minority who vigorously opposed this sale, and who had confidence in the ultimate success of the company. On which side Mrs. Bowman ranged herself in this controversy she does not say, nor does the proof indicate. At that time the indebtedness of the concern did not amount to over \$1,000.00 or \$1,100.00, but the company did not have much money with which to pay these debts and they were pressing for payment.

In accordance with the decision of the shareholders at the August meeting, the company's property was advertised and sold the 19th of September, 1912, to the highest bidder, and the proof shows it was bid off at \$1,900.00. This sale a majority of the board of directors or share-

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holders, we do not know which, refused to confirm, but rejected the sale and decided to continue the business. It does not appear whether Mrs. Bowman favored or opposed this sale, but she evidently knew all about it, and evidently knew at the time the financial condition of the company. Her statement to Mr. Harris, as she gives it, clearly indicates such knowledge.

After the company decided to reject the sale made the 19th of September and to continue the business, the board of directors then began to cast about to find someone who would loan the company money enough to pay off the debts it owed. Defendant Ryan had the money, and having confidence in the company, expressed a willingness to the board of directors to loan it \$900.00 to be used by it in paying off the pressing debts against it. The board in a meeting agreed to borrow from him that amount of money, and authorized the president and secretary to negotiate and close such loan with Mr. Ryan, and execute to him a mortgage on all of the company's assets including its formulas, franchise and good will as a security for the loan. In accordance with the directions of the board, the president and secretary borrowed \$900.00 from defendant Ryan on the 19th of September, 1912, and executed the company's note to him due thirty days after date, and on the date of the note, to-wit, 19th of September, 1912, the president and secretary executed to Mr. Ryan a mortgage covering all of the company's property to secure the payment of the note of that date due thirty days thereafter. This mortgage was registered in the office of the Register of Davidson County, Tennessee, and, together with the note, was sent to Mr. Ryan at Murray, Ky., and received by him on the 21st of September, 1912, and on this latter date he sent his certified check to the company at Nashville for \$900.00, which check was paid to the company and the

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proceeds realized therefrom used as stated by the secretary in paying the pressing indebtedness then existing against the company. The secretary produces the receipted bills against the company which were paid with the proceeds of this check, and also files as exhibits to his deposition a statement of the different checks that he as secretary drew against the proceeds of the Ryan check, which checks showed they were issued to the creditors of the company. After the Ryan money was thus used, according to the statement of the secretary, there could not then have been many debts unpaid and outstanding against the company, though we think there were some still due and unpaid.

When Ryan loaned this money to the company he had no knowledge whatever of the purchase by complainant of any stock in the company, or that she was then one of its shareholders, or that she was dissatisfied with her purchase or thought of instituting suit to recover back her money. The company continued to do business, and we hear no more of Mrs. Bowman until this bill was filed, the 13th of February, 1913, about five months after Ryan had loaned the company his money and had tided it over its worst financial stress or condition. It is said in the bill, and Mrs. Bowman in a way so testified, that demand was made of the company for a return to her of the \$500.00 she paid it for stock; but evidently this was done just before she filed her bill, and by the advice of counsel with the view of bringing this suit. So far as the company is concerned, and so far as all of the defendants to this bill are concerned, excepting Harris, it nor any of its stockholders or officers ever heard of her dissatisfaction with her purchase until about the time she filed this bill, nearly a year after the transaction. Manifestly she held on to her stock, hoping with the assistance Ryan had given the company in September it would be able to tide over its diffi-

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culties and ultimately be successful, as a majority of the shareholders thought when they borrowed Ryan's money. From the time she bought the stock until she filed her bill the company was a going concern doing business as usual, manufacturing its medicines, placing them on the market and selling them when it could do so. So far as the outside world could know during this period from February 16, 1912, to February 13, 1913, all was serene on the inside of the Home Medicine Company, the financial rocks and shoals had been avoided, and its business outlook was hopeful.

When complainant filed her bill she charged in it that the mortgage to Ryan was fraudulent and void, made to hinder, delay and defeat the creditors of the company in the collection of their debts against it, and sought to have it set aside and declared null and void for that reason. Complainant prayed for and obtained the issuance of an attachment against the assets of the company, which was levied upon the same. An injunction was prayed for and granted enjoining Ryan from attempting to enforce his mortgage against the property of the company, which the bill said he was then threatening to do; but it does not appear that he had ever taken any steps to enforce it. On the 25th of February, 1913, twelve days after the bill was filed, a consent order was entered in the cause in which it was agreed that the injunction and attachment issued and levied was "recalled, vacated and annulled insofar as the selling of any stock, goods or medicines of the defendant company now on hand is concerned. And said injunction and attachment is hereby modified and changed so that the said Home Medicine Company and its officers may continue its lawful business and hold the funds arising from any sales, or the collection of any notes or accounts subject to the further orders of this Court." This agreed order

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seems to have left the business of the company in the hands of its officers, and they were authorized to continue it just as they had been before the bill was filed, but required to hold the funds arising from such business "subject to the further orders of the Court". So that this was not only a going concern from the time complainant bought her stock until she filed her bill, but by agreement of her counsel she continued it a going concern from the 25th of February, 1913, until the 14th of March, 1913, when another order was made by the Court referring to the one just cited, which order is as follows:

"It is therefore ordered, upon motion of complainants made in open Court, that said Home Medicine Company make its report to the Clerk and Master within ten days showing what stock in the way of production of the company it has sold, the proceeds realized and the expense incident thereto, and that it will pay into Court in the hands of the Clerk and Master the proceeds of such sales less the expense incident thereto, and that said company make and file such report and pay in such money to the Clerk and Master of this Court."

Complainant through her attorney again recognized this company, on the 14th of March, 1913, as a going concern, and the only restrictions upon it is to pay the net profits of the business into the hands of the Clerk and Master of the Court to be held by him subject to the further orders of the Court. Matters thus stood with reference to the business of this company until the 17th of June, 1913, when on motion of complainant's solicitor the Court appointed Robert Vaughn, the Clerk and Master, receiver to take charge of all of the property attached in this case, and to remove it to less expensive quarters, and unless a replevy conditioned in amount as required by law is given for said

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property in ten days from the date of the order, the receiver was ordered to advertise and sell the property for cash to the highest and best bidder and report his action to the Court. In accordance with this order the Master sold the property some time in July following, just when or at what price it was sold for is uncertain.

On the 18th of June, 1913, and before the Master, as receiver, sold the property as directed in the order just referred to, counsel for complainant and defendant, feeling uncertain and doubtful about what property of the company was attached and included in the order of sale, made as stated *supra*, and thinking it doubtful whether the formulas for making medicines, books and accounts, franchise and good will of the company were attached and held under such attachment and included in the order of sale made, entered into a written agreement; and as there is much controversy as to the proper construction and meaning and intention of the parties to such agreement we think it better to copy it in full in this opinion, and will later deal with the questions raised in regard to its construction when we come to consider the assignment that challenges the correctness of the Chancellor's interpretation of this instrument. The following is the agreement in full:

"In this cause, it appearing that by interlocutory order heretofore made and entered, the Clerk and Master was authorized to advertise and sell the property attached, and that the same has been accordingly advertised, and the attorneys representing the parties, complainants and defendants, agree that it is not clear that the formulas, rights, franchises and good will of the defendant Home Medicine Company is attached and embraced in said order of sale.

"The parties and their attorneys, including the defendant Nat Ryan, mortgagee, under the mortgage referred to

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in the bill, hereby agree that said formulas for making the medicines, books and accounts, the property of the Home Medicine Company, and all of its formulas, rights, franchises and goodwill are attached, and are included in said order of sale, and if not, they further agree that all these may be sold, together with the property attached, at the same time and place and under the same advertisement, and that all the proceeds resulting from said sale be collected and held in the same manner as provided for whatever may have been attached.

“It is further agreed by the parties and their attorneys, and especially by the complainants, insofar as they can agree, that the proceeds of such sale, after deducting the full amount of the claim of the complainant Anna Bowman, still in litigation, with interest and the cost of suit, may be applied to the debt of defendant Ryan secured by mortgage; and it is also agreed that the purchaser at such sale may have immediate right to possession of all the property sold under the law by virtue of said former order and this order and agreement in the cause.

“The parties agree that this agreement may and shall be made the order of the Court.”

It clearly appears from this record that none of the shareholders or members of the board of directors and none of the officers of the company had any knowledge whatever of the statements made by Harris to complainant, Mrs. Bowman, at the time she bought stock in the company. What representations, whether true or untrue, he made to her as an inducement to her to buy the stock none of the defendants excepting Harris had any knowledge until they learned of these statements from the charges in complainant's bill. They not only did not know of such statements, but they had no reason to believe he had made them. The

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officers who signed the stock sold to her knew she had bought it, and that is about all they did know of her purchase. The other defendants are not shown to have even had that knowledge, though it is probable some of them learned of the purchase by her about the time or not a great while after it was made. We think the foregoing recital of facts, as we gather them from the record, is sufficient for a determination of the legal questions raised by the different assignments appellants have filed in this Court.

It is first insisted that complainant slept on her rights. Conceding that fraudulent representations were made by Harris to her, on which she relied and believed to be true at the time she bought the stock, and that had she acted promptly and disaffirmed the purchase she would be entitled on the bill filed for that purpose to a rescission, yet learned counsel insists that she slept on her rights and waited too great a length of time before invoking the aid of a Court of equity to annul and rescind her contract of purchase of this stock. It is a well recognized rule of equity procedure which ordinarily would repel complainant in her effort to rescind, that nothing can induce a Court of equity to exercise its extraordinary jurisdiction to decree rescission of contracts except conscience, good faith and reasonable diligence. This rule is announced substantially in the above language in the case of *Talbot v. Maynard*, 106 Tenn., 71; *Anuckles v. Lee*, 10 Humph., 576, 94 Tenn., 57, 98 Tenn., 44. When one with full knowledge of the fraud of which he complains sleeps on his rights, he will be repelled by a Court of equity and rescission denied: *Railroad Co. v. Gardino*, 116 Tenn., 368. Where a party seeks to rescind a contract he must do so at once upon learning the ground upon which the rescission is asked. The right to rescind must be exercised

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immediately upon discovery of the fraud, and any delay in doing so and the continued employment, use and occupation of the property received under the contract after discovery of the fraud practiced upon such person will be deemed an election to confirm the fraudulent contract; *Schiffer v. Dietz*, 83 N. Y., 300; *Railroad Co. v. Giardino*, *supra*. It is hardly necessary that we decide this question and determine whether Mrs. Bowman has elected to confirm the fraudulent contract by her delay in bringing her suit to rescind it, but it looks very much like this insistence of learned counsel should be sustained. She bought this stock on February 16th and 21st. She began to feel a little bit of uneasiness about the financial condition of the company in May following, but notwithstanding such feeling she clung to it and made no objection to her purchase until in August thereafter, when at a meeting of the stockholders or board of directors she became convinced and fully advised, according to her own testimony, that the company was busted and no good. She did not then go to the company with her complaint, but stopped in demanding of Mr. Harris a return of her money. He did not have it. It had been paid over to the company and it was a proper person to which to make complaint. At this meeting it was decided to sell the property of the company. It does not appear she objected to such sale or what was her attitude in regard to it. The property was sold but a majority of those interested refused to confirm the sale. How she stood in regard to confirmation or rejection does not appear. After the sale was rejected the board of directors decided to borrow from Ryan money to be used in paying the pressing debts of the company. What her attitude in regard to this loan was she fails to disclose in her testimony. Whether she favored or objected

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to borrowing the money does not appear, and inasmuch as it does not appear that she objected, we think it fairly inferable that she thought that was the thing to do and was agreeable to this procedure. She does not testify that she did not know the money was borrowed from Ryan, and the strong probabilities are that she knew all about it, and knowing all about it made no objection to it.

Now, it would be wholly inequitable to permit her to come into Court after she stood by and knew that Ryan was loaning the company his money and taking the mortgage on its property as security for its payment, and repudiate her purchase of this stock and have the company's property that was pledged as security for this loan to Ryan with knowledge on her part of that fact, taken from him and applied to pay and discharge her debt against the company. We think it unnecessary to decide this question, but if required to do so we would hold that she slept on her rights and elected to confirm the fraudulent contract she entered into and was too late in seeking its rescission when she filed her bill the 13th of February, 1913.

One of the main and principal grounds contested in this lawsuit is the right of complainant to a decree against these officers, shareholders and directors of the company. The company not having appealed from the decree against it, the correctness of such decree is not now before us. But the individual directors and officers against whom such decree was pronounced did appeal and by their assignments challenge the correctness of the decree the Chancellor rendered against them, and this question will now be disposed of.

There is no statutory law in force in this State, so far as we are advised or our search has enabled us to discover, that holds and makes these officers and shareholders liable

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to a decree in complainant's favor on the facts of this case, and Mrs. Bowman's learned counsel has not cited any statute that gives her the right to such a decree on the facts he presents in this record. Complainant comes into Court seeking a rescission and a decree against these defendants for money had and received by them to her use, and in such attitude she appears in this case as a creditor of the medicine company and seeks to make the other defendants liable to her as such creditor for the amount of the recovery sought upon the ground that Harris when he sold her the stock and made these fraudulent representations by which she was induced to buy it, was the agent and representative of these defendants, and whether they knew of his fraudulent statements or not it is insisted they are liable for the false statements made by their agent. The weakness of this insistence lies in the fact that Harris was in no sense, legal or otherwise, the agent of these appellants. He was the agent and employee of the Home Medicine Company, working for it and paid by it. The other defendants, these appellants, never employed him in their individual capacity to represent or to act for them. They did not pay him nor did he perform any services for them. In selling the stock to Mrs. Bowman, Harris acted as the agent and representative of the company and not as the agent and representative of these other defendants, the appellants.

We think the Tennessee decisions, as well as the decisions in other jurisdictions, will sustain this statement of Harris' relationship to the company and these appellants. The corporation, the Home Medicine Company, was a distinct legal entity and had various persons in its employ and working for it, including Mr. Harris. These directors and officers of the company were in the employ

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of this entity, the Home Medicine Company, and were working for it, and if paid for such services were paid by it. They were agents and representatives of the corporation, just the same as Mr. Harris was its agent and representative: *Hume v. Bank*, 9 Pick., 744, and cases there cited. As agents of the corporation, the Home Medicine Company, the officers and directors are liable to it both for nonfeasance and misfeasance, and may in a Court of equity be proceeded against by the shareholders and creditors in proper cases, who would be subrogated to the rights of the corporation against the members of the board of directors: 6 Baxter, 263-277; 1 Lea, 398; 9 Lea, 744. In such case, however, where a shareholder or creditor seeks to reach and recover a decree against members of the board of directors, they must first apply to the corporation to have it bring the suit, and if it fails or refuses to do so, then the shareholders can maintain in equity such suit. To enable creditors to sue directly the officers of the corporation, they must have some independent right of action, legal or equitable, such as a case where the directors have been guilty of intentional fraud or wilful mismanagement: 9 Lea, 745. But there is no such case made by this bill. It is not pretended that these officers were guilty of any intentional fraud on complainant or any wilful mismanagement of the affairs of the company. So far as they are concerned they could not have been guilty of intentionally defrauding Mrs. Bowman, for the reason that they knew nothing of her purchase of the stock at the time she made it, and certainly knew nothing of the representations made to her by Harris. Consequently, there is nothing on which to base a charge of intentional fraud on their part.

Where the charter of a corporation, as is the case in all charters issued to monied corporations, makes the direc-

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tors liable individually for debts created in excess of the capital stock, such directors are liable only for such debts as they agreed to create, and no further: 87 Tenn., 62-4; 93 U. S. R., 231. Where liability is sought in that kind of a case, the creditors must first request the corporation to sue, and if it refuses, then they may sue themselves and on behalf of all other creditors of the corporation, or, if the corporation has made an assignment, in such case they must request the assignee to bring the suit before creditors can do so, and if he refuses, then they can maintain the action in a Court of equity. But even then they must show by proof that the directors sued agreed to create the debts and that their debts were in excess of the capital stock of the company. In such case, if the proof sustains such charges, creditors would be entitled to a decree against the members of the board of directors who agreed to the creation of the debt in question. A bank is not liable to depositors for their deposits unless the loss results from the intentional fraud or wilful mismanagement of the affairs of the bank by the members of the board of directors: 96 Tenn., 98; 95 Baxter, 634.

There is no privity of contract between this complainant and any of the members of the board of directors or any officer of the company. She had no contract with them. Her contract was with the company and not them, and for that reason she cannot sue them and recover a judgment for her money unless she charges and proves that such directors were guilty of intentional fraud which induced her to enter into a contract with the company, and no such case as that has been made in this record. As stated, there is no statute that fixes a liability upon these directors on the facts we find in this record, and in all cases where there is a statutory liability placed against the

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officers of a corporation for their intentional and wilful fraudulent conduct or mismanagement of its affairs, such statute being in derogation of the common law must be strictly construed: 95 Tenn., 636; 87 Tenn., 62; 88 Tenn., 402.

In *Deaderick v. Bank*, 100 Tenn., 457, the Supreme Court held that directors of a bank are not individually liable to creditors unless made so by statute, by reason of mere negligence when there is no wilful or fraudulent misconduct in the management of the bank's affairs while it is a going concern and apparently solvent. In that case, Mr. Justice Beard, who usually stated legal propositions with great distinctness and clarity, said: "A corporation is a distinct entity. Its affairs are necessarily managed by officers and agents it is true, but in law it is as distinct a being as an individual is and is entitled to hold property as absolutely as an individual is," citing cases. The learned Justice quoted from 3 Thompson on Corporations, section 490, as follows: "And its directors are agents in the eye of the law, not of the stockholders but of this legal entity, the corporation."

In *Wallace v. Lincoln Bank*, 5 Pick., 641, the Supreme Court of Tennessee announced as follows: "Directors are not express trustees, they are mandatories; they are agents; they are trustees in the sense that every agent is a trustee for his principal and bound to exercise diligence and good faith. They do not hold the legal title and more often than otherwise are not the officers of the corporation having possession of the property." In speaking in regard to the creditors of corporation and their relationship to the directors thereof, Mr. Justice Beard said: "The directors of a corporation, whether able to pay its debts or not, owe no allegiance to them, that is, to the creditors. It is true

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that the creditors may extend credit on the faith that the company has assets to pay its debts and that these assets are prudently managed, yet they (the creditors), are strangers to the directors; they maintain no fiduciary relation with them; there is a lack of privity between the two," and quoting from the Supreme Court of the United States in *Briggs v. Spaulding*, 141 U. S., 130, it is said: "The relation between the creditors and the corporation is that of contract and not of trust, but there is nothing of either contract or trust in all ordinary cases, to create any relation between the creditor and the director. The creditor of a going corporation being thus a mere stranger, we think it clear that he can no more, after the suspension of the corporation by insolvency, either in law or equity, set in motion litigation to hold its directors liable for losses attributable merely to inattention than could the creditor of any other insolvent debtor maintain suit against his agent, under similar circumstances."

In Mr. Thompson's work on Corporations, 4th Vol., section 4137, he says: "We find that it has been held that the fact that directors and officers of a corporation have mismanaged its business does not render them liable to creditors unless they are made liable by the provisions of the articles of incorporation or by special statute. Neither, in the absence of a special statute, are the directors of a bank liable to a general depositor for mismanaging the affairs of the bank so that his debt is lost, and, unless they are made liable by statute, the breach of duty of which they have been guilty is to the bank, and not to the customers."

If, then, a creditor can get no relief against a director of a corporation for mismanaging its affairs, unless that relief is given him by statute, certainly this complainant

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is not entitled to the relief sought by her bill, first, because there is no statute affording her such relief, and, second, because she has not charged or proved any fraudulent or intentional misconduct or acts upon the part of any one of these directors that caused her to enter into this contract.

In the 10th volume of Cyc., 649, the rule is stated as follows: "The general rule, as already seen, is that the corporation and its shareholders are distinct persons in law. The general rule of law, therefore, is that the shareholders of a joint stock corporation are not liable for its debts . . . unless made so by constitutional or statutory enactment, or unless they have assumed a larger liability by contract or consent." Again, on page 838 it is said, "The general rule, subject to exceptions hereinafter pointed out, is that the directors of a corporation are not liable for its debts and undertakings although contracted or undertaken through their instrumentality." On page 839 of this volume we find the rule stated in this language: "The rule for exonerating the directors from personal liability for the control and obligations of the corporation created through their instrumentality, assumes that in creating them he was acting within the scope of his authority as its contracting officer or agent, for in that case it is what it is intended to be, the contract of the corporation." On page 826 of this volume, in dealing with the supposed liability of directors for frauds of the subordinate agents appointed by them, it is said the reason of the nonliability of such directors for the frauds of such subordinate agents is that "the agent directly committing the wrong is the agent of the common principal, the corporation, and not the agent of the director by whom he is appointed; and, hence, that the doctrine of respondeat superior does not

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in such case apply to the director. This doctrine has been applied where the intermediate agent was a steward or manager of mines, the president, the general agent of the corporation, the selectman of a town or the captain of the vessel." On page 828 the author says: "As in the case of other agents, directors are not in general liable to make good the obligations assumed by contract with the corporation, unless they themselves have assumed such obligation by special promises founded on a good consideration."

In the case we are now considering the contract with complainant whereby she bought stock of this company was not made with these directors, but with the company. It is true the contract was entered into by a subordinate agent and Mrs. Bowman, but that agent was the agent of the corporation and not the agent of any of these directors, although while in a meeting of the board they may have unanimously voted to appoint him such agent. They were voting in that case to appoint him the agent of that corporation; not to appoint him as their agent to act for them, but as the agent and to act for the corporation, and while he was selling his stock to complainant he was acting as the agent of the Home Medicine Company, selling for that company, speaking for it, receiving her money for it and delivering this stock to her on its behalf, and not in any sense was he acting as the agent of or for either or all of these directors.

So that we have reached the conclusion that if complainant was induced by the fraudulent statements of this agent to enter into this contract, the fraudulent statements were those of the agent of the Home Medicine Company and the contract she made was with it and not with either or all of these directors. There was no privity of contract between her or them or either of them, and before she has a right to

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recover a judgment on the facts stated in her bill and shown by her proof she must go further and show that the contract was with these directors and that this man Harris was their agent, acting for and in their behalf and for their benefit. This she has not done. We have reached the conclusion that the decree of the Chancellor rendering judgment in her behalf against them for the money she paid to the corporation and interest thereon was not warranted by anything appearing in this record, and it is, therefore, reversed as to all of the appealing directors and officers of the company who are now before the Court.

We come next to consider the agreement entered into between complainant's attorneys and the attorney for the defendant Ryan, which agreement was spread upon the minutes of the Court. But before doing so it is probably better to notice the insistence of learned counsel for complainant that the mortgage made by the company to Ryan was void because made at a time when it was wholly and absolutely insolvent, as is insisted upon by him. The company may have been insolvent when this mortgage was made to Ryan. That might be conceded. And yet the mortgage would be a good and valid contract between him and the company. When the board of directors authorized the borrowing of this money and the making of this mortgage they may have been conscious of the fact, or may have believed, that the company was then insolvent. Yet it is manifest that a majority of them had confidence in its ultimate success and believed that if the money could be borrowed from Ryan and the pressing debts paid, the company would be able to tide over its difficulties and finally make a safe landing. It was then, under all of the decisions in Tennessee, a going concern and, consequently, authorized to create an incumbrance on its property to secure the loan then made.

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In *Voightman v. Railroad*, 123 Tenn., 457, Mr. Justice Neil, after citing all the cases in Tennessee upon the point in regard to the test of whether the corporation was at the time of making a mortgage or an attachment was levied upon its property, a going concern, said: "There are several tests indicated in these cases for the purpose of fixing the period or point of time when the assets of the corporation are converted into a trust fund for creditors. One of these tests is that it has permanently ceased to do business or to exercise its franchise."

In the case of the Home Medicine Company, when this mortgage was made it had not only not permanently ceased to do business, but it had not ceased to do business at all. Its affairs were still being conducted by its officers in the usual and ordinary way they had always managed them.

In *Memphis Barrel Co. v. Ward*, 99 Tenn., 177, in speaking for the Court, Mr. Justice McAlister said: "The settled rule of this State is that the assets of an insolvent corporation become, from the date of its assured insolvency, a fixed trust fund for equal pro rata distribution among its creditors." He quoted from *Comfort v. McTeer*, 7 Lea, 660, to this effect: "There must, however, be some positive act of insolvency, such as the filing of a bill to administer its assets or the making of a general assignment, or a permanent cessation to do business."

In *Tradesman Publishing Co. v. Car Wheel Co.*, 11 Pick., 634, the Supreme Court held that the execution of trust deeds by a corporation conveying all of its property to a trustee was a confession of insolvency and *ipso facto* converted its assets into a trust fund for the benefit of all its creditors. In that case the trustee took charge of the property of the corporation the very day, or the next day after the execution of the trust deed, and these facts the

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Supreme Court held were acts of insolvency so as to convert its assets into a trust fund.

In *McLauren v. Rolling Mill Co.*, 11 Pick., 696, the Court held that a creditor, "While a corporation is a going concern, although actually insolvent, is entitled to pursue the ordinary legal or equitable remedies for the enforcement of his claim. But when a corporation is dissolved or determines to discontinue the prosecution of its business, or makes a general assignment, or commits any other overt act determinative of positive and assured insolvency, its property is thereafter affected by an equitable lien or a trust for the benefit of all its creditors." The same rule was announced by the Supreme Court in *Smith v. Bradt Printing Co.*, 97 Tenn., 351; and in *Bank v. Lumber & Manufacturing Co.*, 91 Tenn., 12, the Court, speaking through Mr. Chief Justice Turney, said: "A corporation is not insolvent in such sense that its assets become a fixed trust fund in the hands of its officers for *pro rata* distribution among its creditors so long as it continues to be a going concern, conducting its business in the ordinary way, although its debts may greatly exceed its assets."

Applying the principles stated in these decisions, the Home Medicine Company, while it was pressed for money when this mortgage was made, and while perhaps its assets were not then sufficient to pay all of its debts, was being operated at the time just as it had always been, in that it was making its medicines, putting them upon the market and selling them wherever it could find a purchaser. Indeed, it was in fact then a going concern and continued to be such some time after the bill in this case was filed and its assets attached. The Court, on motion of complainant's solicitor, permitted it to continue to be a going concern and to operate and manage its business as it had

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always done, for six months after the filing of the bill in this case.

In the 10th Volume of Cyc., 1258, in treating of this subject it is said: "While a corporation continues to be a going concern its separate creditors, in the absence of a statutory qualification of the rule, and of course in the absence of collusion and fraud, have the same right against it for the collection of their demands that they would have in the case of an individual debtor. . . ." The author then says, "This doctrine has even been applied in a case where the giving of security in the form of a mortgage inured to the benefit of shareholders and directors, they being ignorant of the insolvent condition of the corporation at the time such security was given."

Mr. Ryan testified, and there was no proof to contradict him, that when he loaned the company money he did not know it was insolvent.

On page 1201 of this volume, this subject is again treated of and it is there said: "The inability of a corporation to deal with its property, when insolvent or in contemplation of insolvency for the purpose of preferring particular creditors, whether this inability is imposed by judicial decision or by statute, does not extend so far as to prevent a corporation, even when insolvent, from making in good faith transfer or mortgages of its property to secure present advances of money to be used in paying its debts, in extricating itself from its difficulties or otherwise in continuing its business, and this is none the less so where a mortgage is made to an officer of the corporation."

The above statement of the rule fits the case of Mr. Ryan to an exactness, except that he was not, at the time he made the loan, an officer or a director of the company.

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The mortgage was made to him in good faith to secure a loan of money advanced at the time of its delivery to him, and the transaction was had for the purpose of extricating this corporation from its difficulties and in order to continue its business. The money was, in fact, loaned; it was used in paying the corporate debts, and done for the purpose of keeping it on its feet and continuing it in business and was in no sense a collusion between the board of directors and Mr. Ryan. The transaction did not increase the company's indebtedness but simply changed the creditors from a number of men to Mr. Ryan. Instead of there being a great many creditors with a large number of small debts, the debts were all concentrated in the hands of one person who in good faith became the company's creditor in order to help it out of its difficulties.

This exact question was before the Supreme Court of this State in the case of *New Memphis Gas Light Company Cases*, reported in 105 Tenn., 268, and it was there stated by Mr. Justice Beard, with his usual clearness of thought and precision of expression, that "One who advances money to a corporation upon faith of its bonds deposited as collateral security is a holder of such bonds for value in due course of trade and entitled to protection as such." Again, the learned justice says: "Directors of a corporation are not forbidden by reason of their position, to deal with the company, and where they have become indorsers for the accommodation of the company they are permitted while it is a going concern expecting to continue in business, to secure indemnity against possible loss from such indorsements. They may receive collateral security direct from the company, or may retain collaterals held by the principal debtor upon their payment of the debt." This opinion by Mr. Justice Beard is one of the

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ablest and most voluminous delivered by him while he was a member of the Supreme Court of our state, and fully sustains the views of Mr. Ryan's learned attorney, that this corporation had the power at the time to borrow this money from Mr. Ryan and to secure him in its payment by the execution of the mortgage in question.

Without extending the opinion further in regard to this question, it is sufficient to say that we think, under the circumstances and conditions existing at the time this mortgage was executed and this loan made by Mr. Ryan, this corporation had the legal power to borrow this money and execute the mortgage on its assets to secure the loan.

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It results that the decree of the Chancellor, insofar as it affects the appellants to this Court, is in all respects reversed and dismissed as to them, and the lien created by virtue of the levy of attachment on the assets of the medicine company is discharged, and it is adjudged that Mr. Ryan is entitled to the proceeds of the sale of all of the property to apply in payment of his debt as far as the same will extinguish it, and the Chancellor's decree otherwise is reversed and set aside.

The costs of this cause will be paid by the complainant excepting such as was necessarily incurred for rents and for taking care of and selling the property. All the remainder of the costs and expenses incident to this suit is adjudged against complainant and the sureties on her prosecution bond.

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A. S. CEARLEY, GUARDIAN, v. MRS. PATSY MULLINS.

Writ of certiorari denied by the Supreme Court, 1917.

1. NON COMPOS MENTIS. *Liability for necessities.*

The estate of a *non compos* is liable for necessities furnished him in good faith.

2. WITNESS. *Competency of plaintiff in action against the guardian of an insane person. Waiver of objection by calling the non compos.*

Where in an action against the guardian of a supposedly insane person the latter is called as a witness to testify as to statements by and transactions with the plaintiff, the rule and the statute forbidding the giving of evidence by the plaintiff is waived to the extent that the plaintiff may contradict the statements of the *non compos*.

FROM MADISON COUNTY.

Appealed in error from the Circuit Court of Madison County. S. J. EVERETT, Judge.

C. E. PIGFORD and W. N. KEY for Plaintiff in Error.

J. M. TROUT for Defendant in Error.

SPECIAL JUSTICE SANSOM delivered the opinion of the Court.

THE real question in this case is as to the right of Mrs. Patsy Mullins to recover against Aaron Cearley, guardian for James Johns, for support, necessities, food and clothing, furnished by Mrs. Mullins to James Johns, the ward.

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An important question to be determined in respect of the liability or non-liability of the guardian, being whether or not the plaintiff below, Mrs. Patsy Mullins, was properly permitted to testify in the case.

The suit was instituted by Mrs. Patsy Mullins against Aaron Cearley, guardian for James Johns, and James Johns before a justice of the peace for Madison County, J. G. Carter, on February 12, 1916, the suit being on account for board, clothing and necessities furnished the defendant James Johns, a person of unsound mind, the account being exhibited with the warrant. Upon the hearing before the justice judgment was awarded in favor of the plaintiff below, Mrs. Mullins, and against the defendant below, Aaron Cearley, guardian, for the sum of \$227.98 and costs of the suit. From that judgment an appeal was prosecuted by the defendant guardian to the Circuit Court, where the cause was again heard before the judge and a jury with the result that judgment was pronounced in favor of Mrs. Patsy Mullins against James Johns and his guardian, Aaron Cearley, for \$231.28 and the costs of suit. There was motion for new trial, which was overruled, and judgment final pronounced, from which this appeal is prosecuted.

Four errors have been assigned.

1. The Court erred in overruling the appellant's motion for new trial because there is no evidence to support the verdict and findings of the jury; because the evidence preponderates against the verdict and findings of the jury, and because the verdict and findings of the jury are contrary to the law and evidence.

2. The Court erred in charging the jury in substance as follows:

"If the plaintiff, Mrs. Mullins, furnished board, clothing and services in taking care of, maintaining and sup-

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porting the defendant James Johns during the years 1910, 1911, 1912 and 1913, she would be entitled to recover the reasonable value of said board, clothes and services less the value of any work that might have been performed for her by the said James Johns during said period of time."

3. The Court erred in permitting the plaintiff, Mrs. Mullins, to testify as to matters and transactions with the said James Johns who was a person of unsound mind, this evidence being allowed to go to the jury over the objection of the defendant seasonably made.

4. The Court erred in rendering judgment against defendant for the reason that the verdict and findings of the jury are excessive and against the great preponderance of the proof.

The facts of the case are not seriously in conflict or controversy. It appears that the defendant James Johns is a man about sixty to sixty-five years of age. He is enfeebled mentally to the point where he is incapacitated from proper care of himself or of his property rights and interests. Physically speaking he is a man of ample strength to carry on the ordinary labors that comport with the services of a man of that age.

It appears that he, some time the latter part of February or early part of March, 1910, went to the home of Mrs. Mullins, the plaintiff below, a widow who occupied a home with her boys, being a tenant upon the farm of Mr. Anderson, in Hardeman County, Tennessee. It appears that Mrs. Mullins had three boys, one of whom perhaps was mentally deficient to the point where he was of little value or assistance to Mrs. Mullins, and was, as the Court gathers from the record, on a par with Johns in that regard. From the date of his coming to Mrs. Mullins Johns continued at her home and was fed and furnished some cloth-

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ing during the greater part of three years, leaving some time in the spring of 1913. During this period with the exception of some intervals of time when he was absent, Mrs. Mullins had furnished food and a lodging for Johns. and had furnished him with clothing in addition, amounting in value to about \$10.00.

It is further apparent from the record as the Court finds, that while the defendant Johns was sufficiently strong physically to have rendered services that would have paid for his board and avoided his being an expense to Mrs. Mullins, yet he did not and would not work except at intervals, and then in a desultory and unsatisfactory sort of way, and the Court is satisfied that the charge made by Mrs. Mullins for the board and care of this man during the period covered by the account of \$6.00 per month, together with \$10.00 for clothing furnished him is a reasonable charge under the facts disclosed in the record, and that she, if entitled to anything at all, is entitled to recover the amount awarded her as compensation for necessities furnished the defendant ward over and above the value of any services rendered by him to her during the period of three years covered by his stay at her home.

Some question is made by the defendant guardian of the fact that Mrs. Mullins sues for \$6.00 a month. He states that this is reasonable board, and at the same time states that \$4.00 per month is a reasonable sum to be allowed the *non compos* as and for compensation for services rendered. The Court does not so understand nor construe the record facts, which are as we find, that Mrs. Mullins places the value of the board at \$10.00 and the value of the services of the *non compos* at \$4.00, thus reaching the \$6.00 per month as net charge for board, and under the record disclosures of fact, aside from Mrs. Mullins own statement as to the value of the services of the

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mentally infirm defendant, we think that Mrs. Mullins' account is supported by the weight of the testimony.

The first error assigned seems to be laid upon the foundation that the defendant Johns did not have sufficient mental capacity to make a contract, and no contract was ever made for him by his guardian or any person having authority to act, and the plaintiff, Mrs. Mullins, when she furnished the board and clothing was under no legal obligation to do so.

The law, as we understand it, upon the question as applying itself to the facts of this case, is laid down in fairly clear terms by Mr. Bishop in his work on Contracts, Section 232:

"In case of insanity, one who, whether by formal agreement with the insane person or not, in good faith furnishes him with necessities, being things required for his sustenance or comfort, and suitable to his means, condition and habits of life, can, if he is not otherwise supplied, recover of him, on a promise which the law will imply, what they are reasonably worth. Were the law not so the insane might perish. Even expenditures and services for the protection of his estate may be included in this class." Bishop on Contracts, Section 232; *McCoin v. McNairy County*, 101 Tenn., 74.

The law may be otherwise stated as follows:

"An insane person, whether under guardianship or not, may be bound by his contract for necessities if it was made in good faith by the other party and under circumstances which justified the contract. Whenever necessities are supplied to a person who by reason of disability cannot himself make a contract, the law implies an obligation on the part of such person to pay for such necessities out of his own property; and the rule applies to a lunatic, whether

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so found or not, when the necessities supplied are suitable to his position in life. But to justify the Court in implying such obligation the necessities must be supplied with the intention on the part of the person making the provision to be paid for them or to look to the lunatic's estate for his pay." Am. & Eng. Law (Second Edition), Vol. 16, page 626.

That being the law of the case, and the facts being as the Court interprets and finds them in this record, that these necessities were furnished by the plaintiff below, and were necessary for the comfort and sustenance, and suitable to the means, conditions and habits of life of the *non compos* at the time when he was not otherwise supplied therewith, the right of recovery exists and the facts developed are ample to support the judgment in the case. The result is the first assignment of error is overruled.

The second error assigned goes to the charge of the Court. We have already given a statement of the facts in the record and succinct statement of the principles of law governing and controlling under such facts, and we are of opinion that the charge of the Court complained of and constituting the basis of the second error assigned does not constitute reversible error, and as a result the second assignment is overruled.

Taking the matter up out of its order we go next to the fourth error assigned, going to the alleged error of the Court in rendering judgment because the verdict was excessive. This assignment addresses itself more directly to the insistence of the plaintiff in error that the plaintiff below, Mrs. Patsy Mullins, charged, according to the weight of the evidence as stated, the *non compos* with board at \$6.00 per month and testified that his services were worth \$4.00 per month, and it is upon this theory the insistence is based that the recovery, if any at all,

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should have been limited to \$2.00 per month for the thirty-one months covered by the account rendered, that being the difference between \$6.00 per month board and \$4.00 per month for services rendered. As already stated, we do not concur with this view as constituting a proper construction of the facts in this case. As we interpret them, the charge made by Mrs. Mullins for board and the furnishing of necessaries was \$10.00 per month for thirty-one months, and as against that she gave to the *non compos* \$4.00 per month credit for services rendered, thus making a net charge of \$6.00 per month against him on account of necessaries furnished outside of the \$10.00 for clothing. We think this is the correct interpretation of the proof and facts as developed, and that being the case, the result is the fourth assignment is overruled.

The third assignment of error is to the Court's action in permitting the plaintiff, Mrs. Patsy Mullins, to testify as to matters and transactions with the *non compos*, James Johns, when his guardian was before the Court as a party to the suit, seasonable objection having been made to the admission of the testimony by the guardian.

In order that this assignment of error may be properly disposed of, we should perhaps state the facts directly in regard thereto, and which go to the basis of the question of the soundness or unsoundness of the assignment.

The guardian of this lunatic was before the Court and a party to the lawsuit, one of the defendants along with his ward. On the hearing of the case before the Court and jury at the conclusion of the plaintiff's testimony and before announcing its conclusion, counsel for the plaintiff stated to the Court and opposing counsel substantially that he recognized under the Tennessee statutory enactment the fact that as matter of law the plaintiff was not a competent.

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witness to testify as to transactions had with the *non compos*, and therefore he could not put her upon the stand for the purpose of proving same, but he offered and tendered her as a witness to the other side, who under the statute were permitted to call her to testify as to such transactions and conversations with the *non compos*. This generous tender upon the part of counsel of plaintiff below was graciously declined by counsel representing defendant below, whereupon the defendant below, guardian of the *non compos*, introduced his testimony, and among other witnesses put upon the stand was the defendant himself, James Johns, and his testimony was taken in behalf of his guardian, going directly to conversations and transactions had between him and the plaintiff below, Mrs. Mullins. Thereupon and after the introduction of Johns himself by his guardian as such witness, the plaintiff, through her counsel, was put upon the stand as a witness for the purpose of rebuttal of the testimony of the *non compos*, and to her competency as a witness and her being allowed to testify in respect of conversations and transactions between her and Johns, objection was interposed by counsel of defendant, and this exception was overruled, and Mrs. Mullins was permitted to testify in her own behalf.

The question is whether or not the Court erred in admitting this testimony over the objection interposed. The statute relied upon is Section 5598 of Shannon's Code, and is in these words:

"In actions or proceedings by or against executors, administrators or guardians, in which judgments may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate or ward, unless called to testify thereto by the opposite party."

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This enactment has never been passed upon as applying to this distinctive question now being presented, perhaps. It has been construed by the Supreme Court in general terms, and the Court in construing it has said that the purpose of this law is to prevent the *surviving* party from having the benefit of his own testimony when by the *death* of his adversary his personal representative is deprived of the dead person's version of the transaction or statement constituting the subject matter in controversy, and as a result the Court further held that where the deposition of a testator was taken and filed before his death in a cause pending in Court giving his statement and version of the transaction between him and the opposite party, that the opposite party was a competent witness, and it was permissible and proper for the opposite party to testify and give his version of the transaction, upon the suit being revived by the executor of the party whose deposition had been taken prior to his death, and which deposition constitutes a part of the record in the cause. *McDonald v. Allen*, 8 Baxter, 446.

And again the Supreme Court has held that if a complainant dies after testifying to the issues made, and file his own deposition as evidence, the defendant may, after complainant's death, give his deposition which will be competent evidence on the trial. *Bingham v. Lavender*, 70 Tenn., 2 Lea, 48.

This is a case where the complainant had filed his bill claiming to be the owner of the note described therein. The answer was filed by the defendant setting up his defense, which if sustained would defeat the right of the complainant. After the issues were thus made by bill and answer the deposition of the complainant was taken going to the questions at issue and after the taking of his deposition the complainant died. Subsequent to his death the deposi-

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tion of Lavender, the defendant, was taken and the question was, whether or not the complainant being dead and his executor being before the Court, the defendant could testify as to transactions between him and the deceased. In this case the Court says that the Legislative Act invoked was intended to give to parties litigant equal rights and protection, that all in interest should be allowed to testify, and to give this exact equality of right, it provided against the competency of the evidence of the living against the dead, going upon the theory that death having silenced the one, the law will silence the other; that both or neither must be able and competent to testify in contemplation of law; the intention being that if one could testify the other might and could, and that if one died before testifying, then the other could not testify.

In the present case the question of physical death does not intervene, but the same principle exactly is applicable. The mental deficient is put upon the stand and allowed to testify as to conversations and transactions had between him and the plaintiff below. His guardian is here insisting that he, the guardian, be given the benefit of this testimony of his ward, and at the same time that the plaintiff be deprived of the right, by reason of this statute invoked, of testifying in her own behalf as to exactly the same matters and transactions about which the defendant Johns is examined.

We are of opinion under this state of facts and circumstances, that the statute in question cannot be invoked in behalf of this guardian; that it has been waived by his own testimony and evidence having been introduced and relied upon in his behalf, thus making Mrs. Mullins a competent witness to this same matter. The underlying principle of the statute is eminently right, but when that principle is not applicable by reason of either party being examined,

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then the other party is a competent witness. It follows that the third assignment of error is likewise overruled and disallowed, and the judgment of the lower Court is affirmed with cost.

C. BUCHANAN v. M. L. GOWER.

Writ of certiorari denied by the Supreme Court, 1916.

1. **CHANCERY PRACTICE.** *Jury trial. Disagreement of jury as to some issues and agreement as to others. Court has no right to divide issues between two juries.*

The verdict of a jury in a chancery case where there are several issues should be upon all of the issues, and if they cannot agree upon all, the court should enter a mistrial and submit all the issues to another jury. It is not proper to take as settled the issues found by a former jury and submit to the new jury the unsettled issues only.

2. **SAME.** *Form and simplicity of issues.*

The issues in chancery should be reduced to the fewest possible number and such as will be determinative.

FROM WAYNE COUNTY.

Appealed from the Chancery Court of Wayne County.
DOUGLAS WIKLE, Circuit Judge sitting as Chancellor.

Ross & Ross for Appellant.

JOHN F. MORRISON for Appellee.

MR. JUSTICE MOORE delivered the opinion of the Court.

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THIS is an action of replevin brought in the Chancery Court of Wayne County to recover the possession of a saw mill. There was a decree for the complainant for the possession of the mill, from which defendant has appealed to this Court and has assigned errors.

One error assigned is determinative of the questions involved on this appeal. It appears that a jury was prayed for, and that seven issues were made up under the direction of the trial judge and submitted to the jury to be passed upon by it. The case was heard by the jury at a special term of the Chancery Court in September, 1913, when the jury agreed upon four of the issues submitted and disagreed as to three of such issues. The record shows that "after hearing all of the proof, argument of counsel and charge of the Court, the jury retired to consider their verdict, and in due time returned into Court and reported a disagreement as to issues Nos. 3, 5 and 7, but agreed on the other issues, and thereupon the jury was discharged and a mistrial entered." Complainant then moved the Court to determine the cause independent of the action of the jury and without the resubmission of said issues to another jury, which motion the Court took under advisement, and the cause was then continued until the next term of the Court. At the February term, 1914, the Court passed upon the motion of complainant to determine the cause independent of the jury without resubmission of the issues to another jury, and the Court was of the opinion, "That said motion is not well taken, and, therefore, overrules the same, to which action of the Court complainant excepted." The cause then came on to be heard before the Court and another jury on the 27th of July, 1915, when the "defendant moved the Court that all the issues heretofore prepared and submitted to a former jury be resubmitted to the present jury, which motion was overruled by the Court, and to

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which the defendant excepted." Thereupon the Court impanelled a jury and submitted the remaining three issues to this new jury, which found them against the defendant and in favor of complainant, after which the Chancellor proceeded to render a decree in favor of complainant and against the defendant, holding that the complainant was entitled to the possession of the property replevined in this cause and entitled to retain and hold possession of it, it being an Erie City sawmill engine, one Southern engine boiler and mill, one edger and equipment, etc. The defendant moved for a new trial, which was overruled, and has brought the case to this Court, and among other errors has assigned as error the action of the Court in refusing to submit all seven of the issues to the jury impanelled at the July term, 1915, of the Court, and insists that the Chancellor had no right to have one jury pass upon some of these issues and have another jury pass upon the remainder of such issues.

Counsel for appellee insists that the Chancellor was strictly within the law in ruling as he did and in submitting the issues to two different juries, as was done by him in this case, and cites us to the case of *S. R. Miller & Co. v. E. A. Adams*, decided by the Supreme Court of Tennessee at Jackson, May, 1898. This is an unreported case, and in fact no opinion was rendered by the Supreme Court in that case further than it simply affirmed the decree of the Chancellor, and upon what grounds its affirmance was based we do not know, and have no means of knowing. It is true the question raised in the case now under review was made in the Miller case at Jackson, but it also appears that other questions were raised in that case which might have been, and probably were, determinative of the case in favor of the affirmance of the decree of the Chancellor. It appears that a point was made on appellants in that case

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that the bill of exceptions did not show that it contained all the evidence, and appellants substantially admit that it did not, but undertook to avoid the force of the rule requiring the bill of exceptions to show that it contained all of the evidence, but without knowing what the Supreme Court ruled upon this point we are clearly of the opinion that appellee was entitled to an affirmance in that case because the bill of exceptions did not show that it contained all of the evidence, and it is very probable the Supreme Court placed its decision upon that ground. There is a very brief entry in the case, and no opinion filed by the Court, and hence we are left to conjecture as to the grounds upon which the Court placed its decision. We do not consider that case any authority in the determination of the question raised in the case now before us.

The statute, Shannon's Code, Sec. 6282, regulating the trial of cases by juries in Chancery, is as follows: "Either party to a suit in Chancery is entitled, upon application, for a jury to try and determine any material fact in dispute, and all the issues of fact in any case shall be submitted to one jury." It would seem from the plain reading of this section of the code that this assignment must be resolved in favor of appellant's contention—that is, that all of these seven issues should have been submitted to and determined by one jury, and not by two juries.

This question was before the Supreme Court of Tennessee in the case of *Berry v. Walton and Bailey*, 1 Overton, 186, and it was there said that jury cannot find one issue and disagree as to the other, but that their finding must be altogether or not at all, citing a number of English authorities in support of the holding.

The question does not seem to have been before the Supreme Court again until at the December term of the Supreme Court at Nashville, in 1915. In the case of

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Minton v. Wilkerson, decided January 22, 1915, and reported in Vol. 182, No. 1, Advance Sheets of Southwestern Reporter, March 1, 1916, the question was again before the Supreme Court and was decided by that Court in an opinion delivered by Mr. Justice Williams, in which he said: "A basic contention of the complainant is that because the jury reported their disagreement on certain of defendant's issues the verdict was vitiated, and no relief in behalf of defendant can be predicated on it. In our view the solution of this question is decisive of the case. The general rule undoubtedly is that when in an equity case there are several issues of fact submitted to a jury, they must find all or none, and may not find on one or more and disagree on another and the verdict be valid," citing the case in *1 Overton*, mentioned *supra*, and other authorities.

We think this question is decisive of the matter before us in this case at present. The jury in the Court below could not find and return a verdict on some of the issues and disagree as to the others. Under the rules as announced in these opinions the jury must agree upon all of the issues submitted to them or upon none of them, in which case a mistrial should be entered. There would be as much consistency and legality in a jury finding in favor of the defendant on a plea of the statute of limitations where a note is sued upon, and disagreeing as to his plea of *non est factum* and its verdict on the plea of the statute be accepted and the issues raised by the plea of *non est factum* submitted to another jury. In this case there were seven issues, and if the insistence of learned counsel is sound, then it might require seven or more juries to determine all of these issues. It might require seven or more trials at that many terms of Court to settle these

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issues. The statute contemplates and in fact it says all of the issues of fact in any case shall be submitted to one jury—not to two or more juries. It evidently contemplates that a jury trial in Chancery shall be just like a jury trial at law. One jury shall settle all the matters in controversy that are submitted to them, or that jury shall settle none of them. Such is the rule at law. The jury must settle and decide all of the issues submitted to it at law or settle none of them, in which case a mistrial is entered, and we think the statute means that in jury trials in Chancery one jury must settle all of the issues submitted to it, and when it disagrees as to any one of them a mistrial must be entered as to all of them, and all of such issues submitted to another jury.

In this case seven issues were submitted to the jury for its consideration, when not more than one, and possibly two, should have been submitted to it. This being a replevin suit to recover the possession of certain personal property, it is strictly a possessory action, and the only question usually involved in such suits is who is entitled to the possession of the property. The peculiar and distinct object of the action of replevin is to recover some personal chattle which has been taken from or detained from the complainants, or plaintiffs' possession, with damages for the detention thereof. Ordinarily, and in fact it is true in this case as we understand the facts, the only question involved in an action of replevin is who is entitled to the possession of the property for which the action is brought: 1 Lea, 316, 392; 2 Swan, 363; 1 Head, 18; 12 Heisk., 366; 14 Lea, 356. It is well settled that the title to personal property may be in one person and the right to the use and possession of it in another person who has no title to it: 5 Sneed, 416.

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The only issue in this case that should have been submitted to the jury, as we see and understand the facts involved in this suit, is this: "Was the complainant, at the time of the institution of this suit, entitled to the possession of the saw mill property sued for in this action?" If defendant sought to defend under the statute of limitations of three years, then an issue on such statute should also have been submitted to the jury at the time the issue suggested above was submitted to it. In this case seven issues were submitted to the jury and the facts involved in each issue were merely evidence of complainant's right to the possession, or of defendant's right to retain it, and the determination of either question alone and of itself did not and could not settle the real and principal question involved in the suit, that is, who was entitled to the possession of the property when the suit was begun. Neither of the issues submitted to the jury, if all of them were found in favor of plaintiff or all of them found in favor of defendant, would, necessarily, settle the main question, that is, who was entitled to the possession of the property. The complainant may have had title to the property and yet the defendant entitled to its possession, and the converse of this proposition is also true, so that we think this case should be reversed and remanded to the Chancery Court of Wayne County to be submitted to a jury alone upon the one issue as to who was entitled to the possession of this property at the time the suit was instituted. All of the facts raised by the seven issues that were presented to the jury were competent evidence bearing upon this one main issue of fact: the right of possession to the property, and neither of them determinative of that one main question.

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If defendant seeks to rely upon his adverse possession of the property in controversy for three or more years before suit brought, then the additional issue of the statute of limitations might also be submitted to the jury for its determination together with the main issue as to who was entitled to the possession of the property when suit was brought. If the defendant had openly, notoriously and adversely claimed and had possession of the property for a period of three years before suit was brought, claiming it as his own against the rights and claims of all other persons and he should maintain such defense by a preponderance of all the proof, then he would show his right to the possession of the property as against the complainant when the action was instituted.

In this view of the case the decree of the Chancellor must be reversed and the cause remanded to the Chancery Court of Wayne County with directions that issue, or issues, be made up and submitted to one jury in accordance with this opinion, which issues are all to be determined by one and the same jury. The case for that reason is reversed and so remanded to the Chancery Court of Wayne County, and the complainant and his sureties will pay the cost of this appeal.

Spencer v. Hardin County.

J. A. SPENCER v. HARDIN COUNTY.

APPEAL. Making of appeal bond. Substitution of pauper oath not allowed.

The court reannounces the familiar rule that where an appeal is prayed and granted upon condition that appellant execute an appeal bond the clerk is not authorized subsequently to take a pauper's oath in lieu.

FROM HARDIN COUNTY.

Appeal in error from the Circuit Court of Hardin County. N. R. BARHAM, Judge.

SHELTON & HARBERT for Plaintiff in Error.

E. W. ROSS for Defendant in Error.

SPECIAL JUSTICE SANSOM delivered the opinion of the Court.

THIS is a suit instituted by the plaintiff below and in error, J. A. Spencer, who was formerly Sheriff of Hardin County, against that County, seeking a recovery of \$490.50, fees alleged to be due him by the County for services which it is asserted he rendered the County. There is attached to the declaration filed in the case an itemized statement of the account for the services, compensation for which is sought.

There was demurrer to the first declaration and that demurrer was sustained, whereupon the plaintiff filed a new declaration, again exhibiting therewith an itemized

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statement of the account sued on. This second declaration was demurred to, as well as the first, and the demurrer was sustained and the suit dismissed, and from that judgment of dismissal this appeal is being prosecuted.

The first question to be determined arises under a motion entered in this Court by the appellee, Hardin County, to dismiss the appeal. This motion is based upon several grounds, the first of which is that the plaintiff in error was granted an appeal on condition that he make and file an appeal bond as required by law, but instead of making an appeal bond, plaintiff in error appealed in *forma pauperis*.

The record shows the following entry made at the end of the order sustaining the demurrer and dismissing the suit:

“From the judgment of the Court in sustaining defendant’s demurrer, plaintiff excepts and prays an appeal to the next term of the Court of Civil Appeals at Jackson, on the first Monday in January, 1917, which appeal is granted by the Court on condition that the plaintiff make bond as required by law and for good cause shown and upon application of the plaintiff, he is allowed thirty days within which to prepare and have signed and filed his bill of exceptions and make and file bond.”

This order was entered on the 17th day of July, 1916, and on the 2nd day of August, 1916, the plaintiff in error, Spencer, executed and the clerk filed a pauper’s oath instead of the bond required by the order of the Court in granting the appeal.

The law is settled in Tennessee that where an appeal is granted and time allowed within which to *give bond*, the appelliant under such circumstances cannot take the oath prescribed for poor persons in lieu of the bond: *Mc-*

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Fetridge v. Gregg, 4 Coldwell, 327-7; *Henley v. Claiborne*, 1 Lea, 225; *Mowry v. Davenport*, 6 Lea, 82; *Morris v. Smith*, 1 Shannon, 27.

The reason of the rule is quite clear. It is within the discretion of the *Court* to grant an appeal, either upon the execution of the bond or taking of the oath for poor persons, and to grant time within which either may be done, not exceeding thirty days. This is a statutory right as well as a judicial right, but where the appeal is *prayed* and *granted upon condition* that the *bond* be executed, then the clerk of the Court cannot take or accept the pauper's oath in lieu of the bond. The order entered in the case granting the time within which the bond may be executed, and fixing the character of the bond, is a *judicial* act upon the part of the *Court* and the taking of the bond itself upon the part of the *clerk* is a *ministerial* act, and, of course, the clerk in the discharge of his ministerial duty cannot waive or change or modify the orders of the Court pronounced judicially.

The motion to dismiss the appeal is therefore sustained. This being conclusive of the case, we take up no further matters presented for determination.

Johnson v. Steger & Sons.

ROSA JOHNSON v. STEGER & SONS.

Writ of certiorari denied by Supreme Court, 1917.

1. **INFANCY.** *Sale of personalty upon installment plan. Ratification.*

An infant who purchases a chattel upon the installment plan, paying some of the installments during infancy and paying others after maturity will be held to have ratified the contract and deprived himself of the right to repudiate on account of infancy.

2. **SAME.** *Burden of proof as to infancy. Burden as to ratification.*

The burden is upon the party pleading infancy in avoidance of a contract to prove disability; and after the infancy has been clearly shown the burden is upon the party suing upon the contract to establish ratification.

3. **SAME.** *Statement of age at time of granting of marriage license. Estoppel.*

The statement of a party as to his or her age at the time of application made for a marriage license is almost conclusive.

FROM DAVIDSON COUNTY.

Appeal in error from the ——— Circuit Court of Davidson County. ———, Judge.

WM. G. EWING for Plaintiff in Error.

R. J. WALSH for Defendant in Error.

MR. JUSTICE MOORE delivered the opinion of the Court.

Johnson v. Steger & Sons.

THIS suit involves the right of possession of a piano for which an action of replevin was brought by defendant in error against plaintiff in error and in whose favor a judgment was rendered by the trial judge without a jury, from which the defendant below has appealed to this Court and assigned errors. The trial judge was requested to reduce his findings of fact to writing, and did so in accordance with such request. He found that on December 30, 1910, Rosa Johnson bought from the Weatherholt Piano Company a certain piano at the price of \$325, that company executing to her a written conditional sale contract, in which title was retained to the piano until the full consideration for same was paid. A cash payment of \$145.00 was made at the time of purchase, \$25.00 of which was paid in an organ value at that amount, and \$120.00 of which was the value of a piano that the Johnson woman had won as a prize in a contest set on foot by the Weatherholt Piano Company, leaving a balance due on the purchase price on the date of purchase of \$180.00. All of this balance was paid except \$103.69 principal, and the interest on same. The defendant, Rosa Johnson, defended the suit upon the ground that when she bought the piano she was only sixteen years old and was therefore a minor, and for that reason not bound by the contract she signed. The written contract recites the facts found by the trial judge and contains a "promise to pay to Weatherholt Piano Company, or order, installments payable as follows: \$6.00 per month until paid in full, at the rate of 6 per cent per annum on all installments from the date of the agreement." The written agreement further provides that, if any of the installments is not paid when due, all of them are then to become due and payable. The trial judge further found that the written contract was assigned, transferred and delivered by the Weatherholt Piano Company

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to the Steger & Sons Piano Company shortly after its execution, and that it had been the owner of said contract and had collected nearly all of the payments made thereon since it was so transferred and delivered to it. The proof shows that payments were made on this contract by Rosa Johnson to Steger & Sons from January 9, 1911, on to January 4, 1915, and after the latter date no other or further payments were made by her to the company on account of this transaction.

The only question involved in the suit is whether Rosa Johnson was a minor at the time this last payment was made. She made a number of payments in the year 1912 and seems to have made no other from the 24th of November, 1912, until the 4th of January, 1915, when she paid \$3.00. On the 26th of October, 1914, she wrote the attorney of appellee a letter, asking further indulgence and promising payment the next week. She seems to have made some payment shortly thereafter. When she wrote this letter she evidently was fully aware of the fact that she was behind with her payments and also knew that she was not bound on her contract made during her minority unless she should ratify it after becoming of age.

The trial judge does not specifically find as a fact the age of this woman, either at the time she traded for the piano or at the time she made the last payment of \$3.00. In her testimony she stated that she was eighteen years old when she married, and that she married in the year 1912; but the record of marriage license kept by the County Court Clerk, which was introduced in evidence at the trial, shows that she was married in 1907 and that it was stated at the time application was made for her license that she was over sixteen years old then. If she was sixteen years old in 1907, then on the 4th of January,

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1915, she must have been about twenty-two years old, and was then competent to ratify a contract made by her when a minor.

Her mother, who was examined as a witness in her behalf, states that she does not know exactly what Rosa's age is, but that she made a record of it in the Bible which she testified was at her house at the time, but which she failed to produce on the trial so as to show what her exact age was.

Having made application for marriage license in 1907, and, in order to obtain it, having given her age as sixteen years then, and such marriage license being issued upon the faith of the truth of such statement, we think she must be held to be bound by the age given at the time her marriage license was issued. While she states she was married in 1912, we think the records of the County Court Clerk's office are more reliable and more to be depended upon than what she testifies about it. The burden of proof is upon her to show that she was a minor at the time she made this contract, and while the burden is probably upon the plaintiff below to show she ratified the contract after arrival at her majority, we think the proof fairly shows that she was of age when she made the last payment of \$3.00 on the 4th of January, 1915, and that she made such payment with full knowledge of the fact that the contract was not binding upon her because made during her minority and that she thereby ratified the contract she entered into for the piano at the date stated *supra*. If we are correct in these conclusions, and we think we are, it follows that there is no error in the judgment of the lower Court and it must be affirmed with costs.

Gilchrist v. Satterwhite.

JOHN GILCHRIST AND WIFE v. MRS. S. T. SATTERWHITE.

1. JUDGMENT BY DEFAULT. *Practice in obtaining, and the form thereof.*

The practice to be pursued in obtaining a judgment by default in a court of law and the form of the entry are suggested in the opinion of the court.

2. SAME. *Setting aside judgment by default. Court has power and discretion to do so.*

The court undoubtedly has the power and discretion to set aside during the time of its rendition a judgment by default upon any showing satisfactory to himself; and in the absence of disclosure of the grounds for such action this court will presume that the circuit judge had sufficient causes or reasons for setting aside the judgment.

3. LANDLORD AND TENANT *and Subtenant. Defective premises. Contributory negligence.*

A tenant or subtenant occupying or using premises and fully aware of their defective condition and laboring under no promise to repair should be held guilty of contributory negligence barring recovery where there is no excuse for inattention at the time of injury.

4. DAMAGES. *Inadequacy of verdict as indicating passion, prejudice and caprice. Not so when record demonstrates plaintiff disentitled to recovery.*

Where a jury in a personal injury case has returned a verdict in favor of plaintiff of one cent it cannot be said that the verdict is the result of passion, prejudice or caprice when the evidence clearly shows that the plaintiff was guilty of barring contributory negligence. In such case the verdict will not be disturbed.

FROM DAVIDSON COUNTY.

Appeal in error from the Third Circuit Court of Davidson County. A. B. RUTHERFORD, Judge.

Gilchrist v. Satterwhite.

C. H. RUTHERFORD for Plaintiff in Error.

HARRY LUCK and W. B. COVINGTON for Defendant in Error.

MR. JUSTICE MOORE delivered the opinion of the Court.

THIS action was instituted by Gilchrist and wife to recover a judgment for injuries alleged to have been sustained by the wife while walking down steps into a cellar under a house, two rooms of which they had rented from a Mrs. Stephens, and who had rented the entire building from Mrs. Satterwhite. Liability is predicated upon the dangerous and unsafe condition of the steps at the time Mrs. Gilchrist was injured, which were known to be in such condition at the time the property was rented, or should have been known by due diligence, and also upon the further ground that after the property was rented to Mrs. Stephens, and after the Gilchrists had rented the rooms and were occupying them, Mrs. Satterwhite was notified of the faulty condition of the stairway and promised to repair and make it reasonably safe, but failed to do so. The case was tried before Judge Rutherford and a jury, who returned a verdict in favor of the plaintiff and assessed her damages at one cent, on which verdict a judgment was rendered for one cent and the costs of the cause. Plaintiff being dissatisfied with this verdict and judgment, moved the Court for a new trial and assigned eighteen grounds or reasons why she was entitled to such trial. Her motion being overruled, she has appealed to this Court, and has assigned five errors, and for these she seeks a reversal of the case and its remand to the Circuit Court for a new trial.

To properly understand some of the assignments it is necessary to give a brief history of the case. Just when

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suit was instituted the record does not disclose, but the declaration was filed the 21st of May, 1914. Previous to the time it was filed, and on the 16th of May, 1914, defendant had moved to dismiss the suit because no declaration had been filed by plaintiff. It is stated in the brief that the suit was pending in Court several months, and no declaration being filed, the motion to dismiss for that reason was made at the time stated. When this motion came on for hearing plaintiff was allowed until the 20th of May to file a declaration, and filed it as stated on the 21st of that month. The case is styled at the beginning of the declaration as *John Gilchrist and Wife v. Mrs. S. T. Satterwhite*. On the 23rd of April, 1915, the defendant under the style of the case of *J. S. Gilchrist and Wife v. Mrs. S. T. Satterwhite*, filed three pleas—that is, this record shows that these pleas were filed by the Clerk of the Court on that date. The record shows that on the 17th of April, 1915, under the style of the cause of *J. S. Gilchrist et ux. v. Lucy B. Satterwhite*, what is termed by learned counsel for appellant a judgment *pro confesso* was entered in the cause, which is as follows:

“In this cause it appearing to the satisfaction of the Court that the defendant has been regularly brought into Court by service of process, and she having failed to plead, answer or demur within the time required by law, it is therefore considered that the same be taken for confessed as to her and the cause set for hearing *ex parte*.”

This entry is substantially in the form and almost in the language of the judgment *pro confesso* entered in the Chancery Court where the defendant fails to appear and make defense within the time required by law. It was after this entry was made on the 17th of April that defendant filed her pleas on the 23rd of April, as we have

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heretofore stated. On the 26th of April an entry was made showing a motion made by a deputy sheriff in which he asked to be allowed to amend the return on his original summons by inserting the name Satterwhite in place of the name Satterfield, and this amendment was allowed. The original summons is not in the record, nor is the affidavit filed by the sheriff on which this motion was based, and hence we cannot say except from inference that the sheriff returned on the summons that he had served it on either Satterwhite or Satterfield. This entry is under the style of the case of *J. L. Gilrest and Wife, Hattie Gilcrest, v. Mrs. Lucy B. Satterwhite*. There does not appear to have been any exceptions to this amendment.

On the 18th of May following, under the head of *J. S. Gilcrest and Wife v. Mrs. Lucy B. Satterwhite*, appears an entry showing a motion by plaintiff to strike from the files defendant's pleas marked filed on the 23rd of April, 1915, on the ground that the pleas were filed after the judgment *pro confesso* was taken against her on the 17th of April. This motion was sustained and said pleas were stricken from the files and held for naught. No exceptions appear from that entry to have been taken to this action of the Court. On the 22nd of May, 1915, under the style of the cause of *J. S. Gilcrest et al. v. Mrs. Lucy B. Satterwhite*, the following entry was made:

"Be it remembered that this cause came on for further hearing on this 22nd day of May, 1915, before the Honorable A. B. Rutherford, judge, etc., upon motion to set aside *pro confesso* and upon hearing argument of counsel it is ordered that the order *pro confesso* heretofore entered be set aside and the pleas of general issues filed by defendant April 23, 1915, be permitted to stand and the cause stand for trial at this term of the Court. Upon motion of plaintiff the affidavit of Alvin McCarn, Esq., is permitted to be

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filed this date and plaintiff excepted to the ruling of the Court."

Thereafter on December 10, 1915, the cause was heard by Judge Rutherford and a jury with the result heretofore stated.

Under the first assignment it is insisted that the trial judge committed reversible error in setting aside the default judgment rendered April 17, 1915, and putting plaintiff on trial on the merits of the cause, and quite an extensive argument and a number of authorities are cited in support of this assignment. Whether the entry made on April 17, 1915, was technically a judgment by default is a matter of some doubt. As stated, it is substantially such an entry as is made in Chancery when judgment *pro confesso* is entered against a defendant who has failed to appear and made defense to the suit. It does not meet the requirements of a judgment *pro confesso* in Chancery, for in such entries it is usual to recite that complainant's bill is taken for confessed and set for hearing *ex parte*, while in this entry it is simply recited, "It is therefore considered that the same be taken for confessed as to her and the cause set for hearing *ex parte*," without reciting what is taken for confessed, whether plaintiff's cause of action as stated in her declaration, or what. The usual procedure in such a case at law, where the defendant fails to appear and make defense to the cause within the time allowed by law, the plaintiff's attorney appears in open Court and moves for judgment by default, and when such motion is made he thereupon directs the sheriff to call the defendant to come into Court and defend the suit brought against him, or failing to do so judgment by default will be taken against him. The entry in this case does not indicate that any such procedure was taken by the plaintiff, nor does it indicate that the defendant was called at all to come into Court.

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Caruthers in his History of a Lawsuit, 154, gives the form of a judgment to be entered in case of default, which is as follows: "On motion of the plaintiff the defendant was solemnly called to come into Court and defend his suit, but failing to do so it is therefore adjudged that the plaintiff recover of the defendant \$1,000.00", or if proof is necessary to show the amount of plaintiff's claim the judgment recites that the plaintiff recovered of the defendant, "his damages to be ascertained by a jury at the present term."

The entry made in the case under consideration by no means conforms to the procedure usual in cases of judgment by default in cases at law. If we were of the opinion that there was any merit in this case we might be inclined to hold that the entry in the record termed a judgment *pro confesso*, was in substantial conformity to a judgment by default. But whatever our opinion may be in regard thereto, there can be no doubt of the discretionary power of the Circuit Judge to set aside a judgment by default at the same term of Court when it was entered. All the cases cited by learned counsel support the right of the trial judge to set aside such judgments and reinstate the case on the docket for trial on its merits, when the motion is made during the term in which the default judgment was entered. It is true Caruthers and all the decisions indicate that before such judgment will be set aside the defendant must show a good defense and a good reason for not having pleaded in time. It is not necessary to take up or analyze the many cases cited by learned counsel. The pleas filed by defendant, and especially the plea of not guilty, shows a good defense she had to this action. It is not absolutely necessary, as we understand the rule, that in order to have such judgment set aside a defendant must show by affidavit the reasons why he failed to plead

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within the time allowed by law. If such reasons are made to appear to the satisfaction of the Court, either by an affidavit or by the status or condition of the record, or by statements of counsel in open Court, such reasons are sufficient if they satisfy the mind of the Court that justice demands that the judgment be set aside and the case put upon trial on its merits. In the entry setting aside the judgment it is recited, upon argument of counsel, the Court thereupon is pleased to sustain it, and he ordered the case to stand for trial upon its merits at that term of the Court. Just what statement, or what facts were presented to the trial judge that satisfied him that the motion should be sustained does not appear from the record, but we are bound to presume sufficient legal reasons were shown that moved the Court to act in favor of the defendant. The trial of this case before a jury has very clearly satisfied our minds that no injury was done plaintiff by the action of the Court in sustaining the motion of defendant to set aside the default judgment, and we therefore overrule the assignment challenging the action of the Court in this respect.

In the second assignment it is insisted that the Court was in error in not setting aside the verdict "upon the ground that the amount of damages fixed by the jury in their verdict was not allowed upon a basis of justly compensating the plaintiff for the injury sustained by her as shown by the uncontradicted evidence." We do not know, and of course cannot know, for the record does not show, how the jury reached the verdict of one cent, or upon what grounds or basis their verdict was fixed. This record abundantly establishes one fact, and that is the gross contributory negligence of the plaintiff as a proximate cause of her injury at the time she received it, and we have no doubt it was upon this ground that the jury

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allowed her the small nominal damages mentioned in its verdict. Under the facts of this case and the charge of the judge the jury might well have returned a verdict against the plaintiff for costs of the cause, and without going into the facts it is sufficient to say that in our opinion such should have been the verdict of the jury. The evidence is clear that plaintiff was not Mrs. Satterwhite's tenant, but the tenant of Mrs. Stephens. It is furthermore clear that she rented the use of this cellar and stairway leading to it from Mrs. Stephens and not from Mrs. Satterwhite. It is furthermore clear that when she agreed to the use of this particular stairway she then knew of its dangerous and unsafe condition, and knowing such she continued to use it in that condition until she was injured.

It is attempted to show that Mrs. Satterwhite had promised to repair and make it reasonably safe. The proof clearly shows that her promise was made to Mrs. Stephens, her tenant, and not to Mrs. Gilchrist, and that it was made after Mrs. Gilchrist had agreed to use this stairway and at the time was in fact using it. It was Mrs. Stephens, plaintiff's landlady, that agreed to repair the stairway and make it safe for the use of Mrs. Gilchrist, and it was she that failed to perform her agreement. So that, under all the authorities we think the jury should have returned a verdict for the defendant. But if wrong in that, plaintiff's contributory negligence as a proximate cause of her injury was abundantly shown, and for that reason the verdict should have been for the defendant.

Under the third assignment it is insisted that the verdict of the jury is so grossly inadequate as to indicate passion, prejudice and caprice on its part. We do not agree with learned counsel that the verdict indicates any such condition of mind on the part of the jury, and feeling

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it unnecessary to deal further with this assignment it is overruled.

Under the fourth and fifth assignments it is insisted the Court erred in not delivering to the jury as a part of his charge two requests set out thereunder. We do not intend to copy these requests in this opinion, but will content ourselves with saying that we are of the opinion that neither is an accurate statement of the law governing and controlling liability in this case. It would subserve no good purpose to copy them into the opinion, but would unnecessarily extend it. These assignments are, therefore, overruled.

It is a matter of serious doubt in our minds whether this plaintiff received such injuries by the fall she claims to have had as is testified to by her on the stand. According to statements made by two other reputable ladies, were witnesses in the case, it is probable that the broken ribs of which she complains were fractured some months before this accident while she was at Craggie Hope; but whether this is true or not, on all the record we think none of her injuries were very serious, and it clearly appearing from the proof offered on the trial of this cause that she was guilty of such gross contributory negligence that the jury felt unwilling to return a verdict against her on the merits of the cause, it was certainly justified in giving her merely small nominal damages on account of such contributory negligence.

For the reasons stated the judgment is in all respects affirmed with costs.

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E. G. MOORE AND WIFE v. W. D. BIDDLE, ET AL.

Writ of certiorari denied by Supreme Court, 1915.

MASTER AND SERVANT. *Scope of employment. Unauthorized search.*

A railway company cannot be held liable in damages for the wrongful and illegal search of the premises of plaintiff made at the instance of a subordinate employee not actually or ostensibly charged with the duty of investigating thefts.

FROM SHELBY COUNTY.

Appeal in error from the Circuit Court of Shelby County.

ANDERSON & CRABTREE for Plaintiff in Error.

J. W. CANADA and FITZHUGH & MURRAH for Defendants in Error.

PRESIDING JUSTICE WILSON delivered the opinion of the Court.

THE original declaration in this case was lost and so was the original summons in the case. But we gather from the amended declaration that the suit was originally brought against W. D. Biddle, W. C. Nixon and Thomas H. West the receivers of the St. Louis & San Francisco Railroad Company, and E. C. Bryant and W. F. Lowe, citizens of Shelby County, and, subsequently, the Nashville, Chattanooga & St. Louis Railway Co. was made a defendant.

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The suit was brought to recover five thousand dollars as damages for unlawfully searching the house and premises of plaintiffs in error for the alleged purpose of discovering stolen property.

The amended declaration alleges that November 22, 1913, plaintiff in error resided at a named number on Carolina Avenue, in Memphis, Tenn., at which place they had resided since August 3, 1911, and that the defendants Bryant and Lowe, then in the employment of the defendant receivers in the capacity of special officers or secret service men, and one Osborn who was in the employ of the Nashville, Chatanooga & St. Louis Railway, all of whom were acting within the scope of their employment, and said Bryant and Lowe were acting for the defendant receivers of the St. Louis & San Francisco Railroad Co., and the said Osborn, acting for the Nashville, Chattanooga & St. Louis Ry., procured policemen from the city of Memphis, and accompanied said policemen to the home of plaintiff in error and then and there, in the absence of plaintiff in error E. G. Moore, in a rude and threatening manner surrounded the home of plaintiffs in error and wrongfully and unlawfully entered the same with said police officers and then and there rudely, ruthlessly and recklessly searched the home of plaintiffs in error, and caused the same to be searched.

It is alleged that the special agents aforesaid, and said Osborn had no warrant or authority for searching their home, that they procured, accompanied and assisted said police officers in making said search, and their conduct in so doing was ruthless, reckless, wanton, wilful, wicked and malicious and their manner and demeanor were threatening, overbearing and insulting.

It is averred that defendants conspired together to make said unlawful search of the home of plaintiffs in error;

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that they acted jointly and in conjunction with each other in perpetrating said wrong and outrage upon the rights of plaintiff in error.

It is alleged that by reason of the said wanton, reckless, unlawful and wicked conduct of the defendants, plaintiff in error, Mrs. Moore was frightened, shamed, humiliated and disgraced; that she was shocked and terrorized; that said special agents, by their insinuations and statements that her husband had stolen and concealed property belonging to the defendants, caused her to be greatly humiliated; that it greatly shocked her nervous system and caused her to suffer great physical pain and mental distress; that she was made sick and caused to suffer physical and mental anguish.

The defendants, Biddle, Nixon and West, as receivers, interposed a plea of not guilty, and the Nashville, Chattanooga & St. Louis Railway also interposed a similar plea. The case, it appears, came on for hearing before the Court and a jury in October, 1914, and under instructions from the Court, they found for the defendants, Biddle, Nixon and West, as receivers for the St. Louis & San Francisco Railroad Co., and the Nashville, Chattanooga & St. Louis Railway Co.

It appears that thereupon the plaintiff took a non-suit as to the defendants E. C. Bryant and W. F. Lowe and thereupon the case was dismissed at the cost of plaintiff below. They moved for a new trial, which was overruled, and excepted and prayed and were granted an appeal to this Court.

They assign two errors in this Court:

1. The Court erred in sustaining the motion of the defendant receivers in the Court below of St. Louis & San Francisco Railroad Co. for a directed verdict in their

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favor at the conclusion of the proof of plaintiffs in error, because—

First, the proof showed that the search of plaintiff's home was made by special officers in the employ of the defendant receivers acting within the apparent scope of their employment.

Second, because the evidence and the reasonable inferences to be drawn therefrom show that the special officers in th employ of the defendant receivers were acting within the apparent scope or line of their employment in this way and caused the search of plaintiff's home.

Third, because the evidence adduced and the reasonable inference to be drawn therefrom entitle plaintiff to the submission of the issues to the jury.

2. The Court erred in directing a verdict in favor of the Nashville, Chattanooga & St. Louis Railway at the conclusion of all the proof for the same reasons set forth above with reference to its action as to defendant receivers.

After an examination of the evidence in this case, and the principles of law applicable to the facts as disclosed, we are unable to find any ground of liability against either one of the railroads sued, and, according to the testimony in this case, the search of the house and premises of plaintiffs in error, under the circumstances was unauthorized and a matter of great outrage and humiliation to them. If they had any remedy at all it was against the individual defendants, and so far as the writer is permitted to speak for himself in this case, he thinks they would have been liable if the suit had been prosecuted against them.

It is possible that Mr. Biddle, Mr. Nixon and Mr. West were in the employment of the receivers of the St. Louis & San Francisco Railroad. It appears that they

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were informed by some negro man that someone had taken a lot of articles from a car of the Nashville & Chattanooga Railroad and carried it to the house in which plaintiffs in error lived. Thereupon, Mr. Biddle and Mr. Nixon and Mr. West, or one or more of them, called up the Nashville, Chattanooga & St. Louis Railway and told them of the information that had been given them in reference to the property being stolen out of one of their cars. Thereupon, Mr. Osborn, who was a demurrage clerk in the local office of the Nashville, Chattanooga & St. Louis Railway, was sent there to see if the property was property that had been taken from one of the cars of that company.

According to the testimony, the party responding to the telephone for the Nashville, Chattanooga & St. Louis Railway, assumed that the parties calling up over the phone had the property in their control. When Mr. Osborn got over there, it was found that the San Francisco people did not have charge of the property, but he was told that it was supposed that it had been stolen and carried to the house of plaintiffs in error. Thereupon, a couple of policemen were secured, and all the parties surrounded the house of plaintiffs in error and made the search complained of.

The proof is that there was no special agent or detective in Memphis in the service of the Nashville, Chattanooga & St. Louis Railway at that time. It is also shown that there was no claim agent in its employ in Memphis at that time. Said railroad simply sent Mr. Osborn to the Frisco freight office and to the special agent's office over there. He did not know of any freight, or have any information of any freight that had been stolen from any car of that company.

Mr. Osborn was not sent, nor was any one sent from that railroad to look out for stolen freight.

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We are unable to see, under the authorities, how any liability could be fastened, under the rules of law, upon the Nashville, Chattanooga & St. Louis Railway.

A very late case decided by this Court, *Townsell v. Louisville & Nashville R. R. Co., et al.*, 4 Higgins, 211, discusses the question involved in the action of agents and servants of railway companies using the processes of law wrongfully and without authority to the harrassment and annoyance of citizens.

That was a case where the servant of the railroad company caused the search warrant to be issued to search the premises of Mr. Townsell to discover stolen property. There was a demurrer to the declaration in that case which was sustained, and this Court reversed the action of the lower Court and remanded the case for further proceedings.

In this case there was no process of law sued out at all.

It seems that these parties assumed the authority to gather up some policemen and proceeded to ransack and search the house of plaintiff in error in order to discover the alleged stolen property. They had no authority existing under any process of law, nor under their employment by the railroad company, to engage in any such conduct. If there was any liability at all it was a personal liability on the part of the individuals engaged in this unlawful enterprise.

There is no error in the judgment of the Court below, and it will be affirmed with cost.

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MAXWELL OPERATING CO. v. CITY OF NASHVILLE.

Writ of certiorari denied by Supreme Court.

Nashville, 1916.

1. **REVENUE. Hotels. Right to operate restaurant without payment of special privilege tax.**

A hotel operator who has paid the privilege tax specified for hotels cannot be required to pay in addition a special tax provided for restaurants. License to operate a hotel embraces the privilege of maintaining a restaurant in connection therewith.

2. **JUDICIAL NOTICE OF CUSTOMS. Methods.**

Courts are permitted to take cognizance of well established and well-known methods of carrying on businesses.

FROM DAVIDSON COUNTY.

Appeal in error from the First Circuit Court of Davidson County. G. B. KIRKPATRICK, Special Judge.

P. M. ESTES for Plaintiff in Error.

EWING & GARARD for Defendant in Error.

SPECIAL JUSTICE R. H. SANSOM delivered the opinion of the Court.

THIS is an action on the part of the plaintiff, Maxwell House Operating Company, seeking a recovery as against the defendant, City of Nashville, of \$41.85, being the amount of certain tax or license fee paid by the plaintiff to

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the defendant under protest, covering an alleged license due on account of the operation of a restaurant or cafe.

There was judgment in favor of the plaintiff against the defendant before the justice of the peace for \$42.60, which judgment was appealed to the Circuit Court, where the case was again tried before the judge without the intervention of the jury, and upon a request the Court made a special written finding of fact, the facts as thus found by him he rendered judgment against the plaintiff in favor of defendant, pronouncing judgment against the plaintiff for costs, and from that judgment this appeal is prosecuted. The findings of fact by the lower Court are in accord with record disclosures, and as follows:

“This suit was brought before a magistrate in Davidson County, Tennessee, to recover from the defendant, the City of Nashville, the sum of \$41.85, which the city had collected from the plaintiff under a distress warrant for a cafe or restaurant tax, which sum was paid to defendant by the plaintiff under protest, and receipt taken therefor. This said sum was paid on January 10, 1916, and suit was brought to recover it from the city on January 17th of the same year.

The Maxwell House is one of the most prominent hotels in the City of Nashville, and is located at the corner of Church and Cherry Streets, now Fourth Avenue, North, in said city, and is well known throughout the country, and has been running as a hotel since 1869.

“In the year 1915 the hotel was taken over by the plaintiff known as the Maxwell Operating Company, a corporation, and is now being run by said company. Until the Maxwell House was taken over by the plaintiff company it operated its dining room on the second floor, from which dining room regular meals were served to the hotel guests of the city, as well as to any other persons who did not

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room at the hotel. For years, and even after it was taken over by the plaintiff company, they had what was known as a merchant's lunch for the popular price of fifty cents, which was served in their regular dining room.

"On or about the first of August, 1915, the plaintiff company opened up on the first floor of the hotel a restaurant, in addition to the dining room that they were then running on the second floor. That the restaurant on the first floor was entered from Church Street and also from the main lobby of the hotel, and it was from this restaurant or dining room that the guests of the hotel were served, as well as many who were not guests of the hotel. This new dining room or restaurant was fitted out with tables and a cashier's stand, and in addition it was fitted with a long lunch counter with stools opposite, upon which patrons might sit. They served quick lunches, kept on hand at all times certain foods prepared to be served at a moment's notice, and at all hours of the day or night. The food, however, was prepared from the main kitchen of the hotel which had always been used for that purpose before the new lunch room or restaurant was opened up. In front of said restaurant on Church Street was placed an electric sign upon which was written, 'The Maxwell House Cafe and Lunch Room,' and also across the windows looking out on Church Street was written the same sign as was written on the electric sign. The restaurant was made attractive, and was fitted up with the necessary equipments that are used in restaurants or lunch rooms to give quick and ready service.

"The plaintiff is the only hotel in the city that pays the tax, or was called upon to pay this tax, which it did pay under protest, and now sues the city to recover back. That the Maxwell House is a large hotel consisting of many rooms and under the Revenue Act of 1915 they pay the

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regular hotel tax as required under said ordinance, and of this tax the plaintiff does not complain, but it does complain of paying in addition to this regular hotel tax that gives it the right to operate the hotel and a dining room, an additional tax as a cafe or restaurant.

“No cafe or restaurant tax was paid by the plaintiff company until January, 1916, although the plaintiff company was requested by an officer of the city to pay this tax in the latter part of the year 1915, after they had opened up their said restaurant or cafe on the first floor of the hotel.

“They ran the dining room on the second floor from the time that they opened up the restaurant on the first floor in August, 1915, practically until the first of January of this year, about which date the dining room on the second uoor was discarded and is no longer used by the plaintiff company, but it has not been fitted up for any other purpose by the plaintiff company, and could still be used as a dining room.”

This Court is content to adopt the findings of the trial judge as to the facts in this case.

There was a motion for a new trial before the lower Court by the plaintiff which contained and was based upon a number of grounds, eight in all, which was overruled and the same grounds are interposed and relied upon as assignments of error in this Court.

There is really but one question in the case material to be passed upon, and that is, whether or not the plaintiff in error can be made to pay a license tax for the operation of a restaurant or cafe in addition to paying the hotel tax. The specific statutory enactment constituting the basis for the action, and upon which recovery is sought, is the General Revenue Act for 1915, being Chapter 101 of the Acts

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for that year. On page 279 of the Acts of 1915 as published there is contained the following provision:

“HOTELS AND TAVERNS.

For each room excepting *dining rooms, kitchens and parlors*, for which more than \$1.50 per day is charged each room, per annum.....\$ 0.75

For each room excepting dining rooms, kitchens and parlors, for which is charged \$1.00 or less per day, per room per annum..... .50

Hotels kept at places of summer resorts to be taxed as other hotels, but may be paid semi-annually.”

On page 288 there is the following provision:

“RESTAURANTS AND CAFES.

In cities, town or taxing districts of 35,000 inhabitants, or over, each per annum.....\$40.00

In cities, town or taxing districts of from 20,000 to 35,000 inhabitants, each, per annum.... 30.00

In cities, town or taxing districts of from 10,000 to 20,000 inhabitants, each, per annum..... 25.00

In cities, towns or taxing districts of from 6,000 to 10,000 inhabitants, per annum 20.00

In cities, town or taxing districts of from 2,000 to 6,000 inhabitants, each, per annum..... 10.00

In cities, towns or taxing districts having less than 2,000 inhabitants, each, per annum..... 5.00

In counties, not in towns, cities or taxing districts, each per annum 3.00”

It is instructive to compare this Act of 1915 with the last preceding Revenue Act which is Chapter 479 of the *Acts of 1909*. On page 1740 of said Acts, there is the following provision:

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“HOTELS AND TAVERNS.

For each room, excepting dining rooms, kitchens and parlors, for which more than \$1.00 per day is charged, each room, per annum..... \$0.75

For each room, excepting dining rooms, kitchens and parlors, for which is charged \$1.00 or less per day per room, per annum..... .50

Hotels kept at places of summer resorts to be taxed as other hotels, but may be paid semi-annually.”

“RESTAURANTS AND CAFES.

(Same as hotels, on each room, in addition as follows):

In cities, town or taxing districts of 35,000 inhabitants or over, each, per annum.....\$40.00

In cities, town or taxing districts of from 20,000 to 35,000 inhabitants, each, per annum..... 30.00

In cities towns or taxing districts of from 10,000 to 20,000 inhabitants, each, per annum..... 25.00.

In cities, town or taxing districts of from 6,000 to 10,000 inhabitants, each, per annum.... 20.00

In cities, towns or taxing districts having less than 2,000 inhabitants, each, per annum..... 3.00

In counties, not in towns, cities or taxing districts, each, per annum 3.00

This shall include all places where meals are served at table.”

Thus going distinctly and directly to the question at issue, whether or not the plaintiff is required or can be made by the City of Nashville to pay an additional license or tax as a cafe or restaurant in addition to its hotel business. It would seem that there ought not to be any question about it. That is to say, this question should have

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been definitely settled as a legal proposition, and should not be an open one for consideration at this late day.

The Maxwell House is an hostelry, and has been in operation, as shown by the statement of facts, for a period of approximately fifty years. Its dining room has been on the second floor of the hotel. It has operated perhaps in two places on that floor, the main dining room and a smaller one.

When the present management of the hotel began operation the first of January, 1915, seeing that the roomers, or a number of them were not taking their meals there, but were going outside the hotel for them, determined that they would dispose of the dining room upon the second floor of the premises and remove the eating department of the hotel to a point upon the first floor assessible from the street, for the specific purpose of retaining the custom of its patrons, and of course securing such additional customers as would be attracted by and to this more accessible point, so that it opened up on the first floor of the hotel property in a room adjoining and fronting upon Church Street, one of the principal thoroughfares of the city, a cafe or restaurant with a lunch counter therein, having all necessary and proper appliances for serving those who sought meals there by way of lunches or by way of specific orders to be prepared, and some of the food and some of the dishes were served from the food already prepared, without customers having to wait any length of time for the preparation of special orders. In other words, it did that class of business that serves the public in respect to furnishing eatables generally. It not only in this way supplied its own patrons, the occupants of the rooms in the hotel, but supplied any member of the public.

It would seem clear, and there ought to be no necessity of giving any definition of a hotel or tavern within the mean-

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ing and contemplation of the Revenue Acts of Tennessee. It is a place where the public is cared for, furnished a place to sleep, and provided with eatables; where the man is ministered to just as in the home. This Court is warranted in taking cognizance of the fact that the hotels of this country are operated on both what is known as the American plan, where there is a daily fixed stipulated price for room and board and proper care and attention as guests, or where a room is furnished for a stipulated sum and meals are furnished to guests according as they shall order articles of food desired, at a price fixed therefor. This Court is permitted, in its judgment, to take judicial cognizance of the fact that in some of the hotels in the larger cities of this country there are different places in the hotels where the guests may be served upon the different plans, cafes, restaurants, dining rooms, grill rooms, and perhaps under other names.

In the passage of Revenue Acts of the character in question, having in contemplation the taxing or licensing of the operation of this class of plant, the Legislature is presumed to have considered the character of business being conducted by the hotels of today, and there are few perhaps of the larger hotels that do not operate upon the basis of both the European and American plan, and the operation of a hotel upon the European plan, separating the cost of the room and the meals, is just as much the operation of a hotel as if the same was upon the American plan, where a fixed stipend is charged by way of compensation for the combined service.

Another distinct difference between the hotel and restaurant is in the degree of liability attaching itself to the guest of the hotel and that of the restaurant. As an illustration of the function of the hotel or inn our Supreme Court has said:

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"An application to the innkeeper for entertainment is sufficient notice of the traveler's intention to become a guest, and supplying his wants and furnishing the entertainment in the way in which the innkeeper publicly professes to entertain travelers are sufficient acceptance to constitute the relationship of host and guest. This may be of any form of entertainment which the innkeeper publicly professes to serve. The traveler receiving lodging without food, or food without lodging, or any other form of refreshment which the innkeeper publicly professes to serve in the usual and customary way in which travelers are entertained, thereby becomes a guest. 22 Cyc., 1075; 16 Am. & Eng. Enc. of Law (2d Ed.), 519; *Overstreet v. Moser*, 88 Mo. App., 72; *Walling v. Potter*, 35 Conn., 183."

The Supreme Court of Nebraska, in *Pullman Palace Car Company v. Lowe*, 28 Neb., 239, 44 N. W., 226, 6 L. R. A., 809 26 Am. St. Rep., 325, quotes the following from *Walling v. Potter*, 35 Conn., 183, *supra*, approvingly:

"In *Wintermute v. Clarke*, 5 Sandf. N. Y., 247, the Court says that, in order to charge a party as an innkeeper, it is not necessary to prove that it was only for the reception of travelers that his house was kept open; it being sufficient to prove that all who came were received as guests, without any previous agreement as to the time or terms of their stay. A public house of entertainment, for all who choose to visit it, is the definition of an inn. These definitions are really in harmony with each other. Webster defines a traveler as one who travels in any way. Distance is not material. A townsman or neighbor may be a traveler, and therefore a guest at an inn, as well as he who comes from a distance, or from a foreign country. If he resided at the inn, his relationship to the innkeeper is that of a boarder; but if he resides away from it, whether far

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or near, and comes to it for entertainment as a traveler, and receives it as such, paying the customary rates, we know of no reason why he should not be subjected to all the duties of a guest, and entitled to all the rights and privileges of one. In short, anyone away from home, receiving accommodation at an inn as a traveler, is a guest, and entitled to hold the innkeeper responsible as such." *Hill v. Hotel*, 16 Cates, 124 Tenn., 380-382.

In other words a hotel keeper is liable and responsible for the baggage of the guest, and under ordinary conditions is an insurer, whereas the ordinary restaurant keeper has no such liability attaching to him because of the relation of landlord and guest is not created by virtue of becoming a mere patron of the restaurant or cafe. This was held in a Memphis case. By virtue of license issued to the plaintiff company as a hotel keeper it has the right and there is conferred upon it power or authority to exercise all of the elements and functions, and there is required at its hands the discharge of all of the duties and responsibilities of an innkeeper. *Vosse v. Memphis*, 9 Lea, 294.

Perhaps the most interesting case along this line is the

NEW GALT HOUSE COMPANY V. CITY OF LOUISVILLE,
17 L. R. A. (N. S.), 566; 111 S. W., 351.

In this case the question at issue was clearly presented on the facts on all fours with those of the case at bar. The Galt House was a co-temporary of the Maxwell House. It, too, had been operated upon the American plan through many years. Changing conditions necessitated the abandonment of the American plan for the European plan. The opinion does not so state, but the record shows that in its case also its old dining room had been upstairs, as was the former custom, and in changing to the European plan

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the restaurant or dining room was placed upon the ground floor.

Upon this change being made, the City of Louisville conceived that the hotel was liable for a restaurant tax in addition to the hotel tax, which they were paying. The case went to the Court of Appeals of Kentucky, which held that the Galt House was not liable for restaurant tax. In its opinion, the Court said:

“Undoubtedly, if the city’s contention is upheld, the appellant must pay two licenses of \$150.00 each. It may be admitted that, if the restaurant as conducted by appellant, were separate from the hotel, the owner would be required to pay a restaurant license therefor; but the question remains whether or not the mere change from the American plan to the European plan authorizes the city to impose upon the appellant two licenses of \$150.00 each, one for keeping a hotel and the other for operating a restaurant. And, assuming that this may be done, are we authorized to conclude that such was the intention of the municipality when the ordinance above set forth was enacted? We do not think such a deduction is maintainable. It is a matter of common knowledge that hotels or taverns, whether conducted upon the American or European plan, permit persons other than the regular guests to purchase meals whenever desired. The main business, of course, is conducting the hotel or tavern. The furnishing of meals to persons other than the regular guests is a mere incident to the business. This incidental business does not change the nature of the regular business, or impose upon the proprietor a double license. It is *immaterial* whether the hotel is conducted upon the American or European plan. Hotels as they are ordinarily conducted (perhaps universally so) furnish both lodging and food to their patrons.

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Indeed, a hotel could hardly be conducted successfully if the proprietor did not afford the guests an opportunity to obtain food within the building. Some might readily lodge in a hotel and secure their meals at another place; but the general traveling public, including women and children, could not do this; and we may assume that no hotel could be successfully conducted which did not provide food for its guests. If the appellant operated on the American plan, and in addition conducted a restaurant in connection with its business, there would be some ground to claim that a double license was due. But it must be assumed that, when the city imposes upon appellant the payment of a license of \$150.00 for conducting a hotel, it intends that it shall have the privilege ordinarily included in the business of the hotel; and certainly if this was not the intention, it was incumbent upon the city to declare a contrary intention in clear and unmistakable language. If appellant is required to pay a restaurant license of \$150.00 per annum, then it will have paid twice the sum that any other first class hotel in the city of Louisville pays which simply conducts a hotel on the American plan. We do not feel authorized to assume that the city intends to segregate the different parts of the business of keeping a hotel, and charge a separate license for each.

“The conclusion we have reached that the city did not intend by the ordinance under discussion to impose upon the proprietor of a hotel, who had paid the regular license, the additional burden of a restaurant license, when that constitutes the only means adopted for furnishing his guests with food, renders it unnecessary that we should discuss or decide whether or not, under the charter, the city has the power to separate the different parts of the hotel business and charge a license for each; and, therefore, this question is not decided. We simply held that, putting a

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reasonable and just construction, the appellant is not required to pay the additional license under the facts as developed in this record.”

Upon the question of taxes and their favor or want of favor some of the Tennessee authorities might be referred to.

The case of *Chattanooga Plow Company v. W. P. Hayes, County Court Clerk of Hamilton County*, reported in 125 Tenn., page 148, involved the question as to whether or not a manufacturer of agricultural implements is a dealer or merchant within the meaning of our revenue statute so as to be liable for a merchant's tax. The company had paid all the taxes which were assessable against it as a manufacturer. This case sets out the sections of the revenue act 1909 and of the assessment act of 1907, and although the language of these acts is sufficiently broad to include a manufacturer within the definition of a merchant or dealer, yet the Court came to the conclusion that a manufacturer could not be required to pay a merchant's license.

In reaching this conclusion, the Court first differentiated the case from a number of cases which involved the whiskey business, and stated that in those cases in which the whiskey business was involved a construction would be given that would affect them not only from a revenue but also from a police standpoint.

“Such statutes rest both upon the taxing power and the police power. While revenue is derived from them, its collection is a wholesome and valuable police regulation of a business that is generally regarded as injurious to the public morals.

“So this line of cases, while entirely sound, is not parallel with the case under consideration, and may be dis-

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missed without further comment. Before determination of the nature of the complainant's occupation or business, it is proper to remark that the assessments and revenue statutes of this State, in force for a great number of years, have been similar in their terms to those under consideration and the executive department of the government has never before construed them as imposing a merchant's or dealer's tax upon manufacturers such as complainant. The construction placed upon a statute by the officers whose duty it is to execute it is entitled to a great consideration. *U. S. v. Ceredo Hermanas y Companis*, 209 U. S., 337, 28 up. C. T., 532, 52 L. Ed., 821; *Union Insurance Company v. Hoge*, 21 How., 35, 16 L. Ed., 61; Cyc., Vol. 36, page 1140. The weight of such construction is of especial force in the case of statutes prescribing penalties, or levying impositions, where the executive construction has been in favor of the persons affected. *U. S. v. 1000, 412 Gallons of Distilled Spirit*, 10 Blatchf., 428 Fed. Cas., No. 15,960.

"It is also a settled rule of interpretation in this State that statutes levying taxes or duties upon citizens will not be extended by implication beyond the clear import of the language used, nor will their operation be enlarged so as to embrace matters not specifically pointed out, although standing upon a close analogy. All questions of doubt upon the construction of the statutes will be resolved against the government, and in favor of the citizens, because the burdens are not to be imposed beyond what the statutes expressly imports. *Eng. v. Crenshaw*, 120 Tenn., 531, 110 S. W., 2 Tenn., 17 L. R. A. (N. S.), 753, 127 Am. St. Rep., 1025; *Memphis v. Bing*, 94 Tenn., 644, 30 S. W., 745; *Crenshaw v. Moore*, 124 Tenn., 528, 127 S. W., 924."

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In that case also the Court used the following language on page 151:

“Complainant has been in business in Hamilton County, Tenn., for twenty-eight years, and has never been called upon to pay any license, or privilege taxes, in the nature of the taxes now demanded.”

This Court is of opinion under the facts as found and the law as enunciated by the Supreme Court of Tennessee that the learned judge who tried this case in the Circuit Court was in error in the conclusion reached and judgment pronounced; that under the facts found and shown to exist under the record, the City of Nashville had no right to levy and collect this license fee, and it having been paid under protest by the plaintiff in error, it should have been awarded judgment for the recovery back of that payment. There is no evidence to support the judgment rendered in the Court below, in the opinion of this Court. The result is that the decree and judgment of the lower Court is reversed and judgment awarded here for the amount of the payment with interest and all costs.

Hull v. Simmons.

MRS. J. W. HULL AND HUSBAND v. K. W. SIMMONS.

Writ of certiorari denied by Supreme Court, 1917.

1. AUTOMOBILES. *Responsibility of owner for acts of borrower.*

The owner of an automobile is not personally responsible for the acts of a party to whom he has loaned the machine in the absence of knowledge of incompetency.

2. SAME. *Must be relation of master and servant.*

An owner can be held liable for the acts of another only when it is shown that the relation of master and servant exists.

3. SAME. *Husband and wife. Former not necessarily agent of wife owning automobile.*

That the party operating a machine at the time of collision was husband of the owner is not conclusive that he was agent of the wife.

4. SAME. *Husband's business.*

If at the time of collision the husband was upon a mission of his own, the wife is not liable for his negligent acts.

5. SAME. *Joint object.*

But if at the time the machine was running to accomplish a joint purpose, or if the journey is in progress partly for a purpose of the husband and partly to aid the wife, then the latter may be held liable as principal. This would be the result where husband and wife were riding in her car with the intention of visiting two points, one of which was the objective of the wife, the other of the husband.

6. AUTOMOBILES. *Passenger riding on footboard of jitney. Contributory negligence.*

It cannot be ruled as a matter of law that a passenger riding upon the footboard of jitney bus is guilty of such contributory negligence as will bar his right of action against another who jams him by the negligent colliding of a car with the one in which he is riding.

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7. SAME. *Riding in unlicensed machine will not bar.*

The fact that a person negligently injured by another was riding in an unlicensed and unregistered automobile is no defense to an action for damages founded upon the negligence of the inflictor of the injuries.

8. SAME. *Duty of passenger as to lookout.*

It is error for the court to instruct the jury that it is the duty of the occupant of an automobile along with the operator to keep a lookout ahead for dangers.

FROM SHELBY COUNTY.

Appeal in error from the Circuit Court of Shelby County.

WILSON & ARMSTRONG for Hulls.

ED. BELL for Defendant in Error.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

PLAINTIFF instituted this suit against Hull and wife to recover damages for personal injuries claimed to have been sustained by him by reason of a collision between two automobiles in the City of Memphis. Simmons was an occupant of one, which was being operated as a jitney, and the colliding car was owned by Mrs. Hull and was in charge of her husband at the time of the collision.

There was a trial before the Court and jury, resulting in a joint verdict and judgment of \$500.00 against the Hulls. They made separate motions for a new trial and are here assigning errors upon the refusal of the Court to sustain those motions. Simmons also entered a motion

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for a new trial and is here assigning errors. We shall treat of the assignments made by Mrs. Hull first.

It is her contention that although she was the owner of the machine, it was being operated by her husband at the time of the collision as a mere borrower and upon his own business. The Circuit Judge submitted to the jury instead of sustaining the motion for peremptory instructions the question as to whether the husband was the agent of the wife and of himself or of the wife at the time of the injury, and the response was that Hull was agent of his wife. This action of the Court is assigned as error.

There is material evidence tending to show substantially the following facts: Hull is a plumber in the City of Memphis, doing an extensive business and owning and operating several automobiles. The wife is the owner of a larger car used by her principally for pleasure. They have no chauffeur to run this latter car. Mrs. Hull operates it generally, and occasionally she requests her husband to operate or consents to his running it.

Upon the day of the injury Hull went to lunch, and while at home his wife asked him to return for her from his business place about four o'clock for the purpose of driving her into the city and to Goldsmith's in particular, where she desired to do some shopping. Mrs. Hull was at that time suffering from an injured arm to such an extent as that she could not manage the car, and requested her husband to operate it for her. He came back to his residence at the appointed time, using one of his own cars. He hailed his wife and notified her that he was ready to carry her to the city in his machine, but she informed him that she would not ride therein, and that he must take her car out of the garage and use it in making the trip, for the reason that she did not like to ride in one of his

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cars. The husband then or at an earlier time informed Mrs. Hull that he desired to drive to the corner of Vance and Fourth Streets for the purpose of inspecting a job. She thereupon told him that he might use her car in making the trip, provided he would return for her. He carried his wife to Goldsmith's and went thence to Vance and Fourth and did his inspecting, and was returning to Goldsmith's very late in the afternoon for the purpose of complying with his wife's instructions and taking her home, and it was upon this trip that he collided with the machine in which Simmons was riding. Hull's residence was at quite a distance from Goldsmith's or from Vance and Fourth.

We are of opinion that the Circuit Judge did not commit error in submitting the question of principal and agent to the jury. We have consulted a vast number of authorities and singularly enough we found no one with facts similar to those with which we have here to deal. The rule is undoubtedly to the effect that in the absence of statute the owner is not liable for injuries inflicted while his machine is in the hands of the borrower; it is also true that before the owner can be held responsible the relation of principal and agent must be established; and it is likewise indisputable that the mere fact that the operator is husband of the owner is not of itself sufficient to make the wife responsible. These principles are deducible from *Goodman v. Wilson*, 129 Tenn., 464, and other decisions. These need not be specifically mentioned as they are but enunciations of the doctrine that the principal is liable only for those acts of *his* agent.

Again, case after case announces the rule to be that if an agent departs from the master's duties and pursues a concern of his own, the master is not liable. Other decisions are to the effect that the lender of an automobile to

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a competent person is not responsible. But not one of these authorities reaches the peculiar facts of this controversy in such way as to require a ruling against the plaintiff as a matter of law. A few of these distinguishing features will now be enumerated.

The primary object in using the larger or family car was to accommodate Mrs. Hull. It is probable that if she had gone with her husband in his machine there would have been no collision. Moreover, Mrs. Hull evidently had in contemplation one journey to be made by herself and husband, and it is apparent that both were interested, and if so, the husband was acting for her as well as himself. It is indisputable that the husband was pursuing to the letter the instructions of the wife in taking her to Goldsmith's and going to Vance and Fourth, and returning there for her instead of going to his place of business, as would have been the usual thing had he been about his own affairs. We think it a reasonable interpretation of the facts that throughout the whole journey, or at least while going to Goldsmith's he was acting for his wife.

Able counsel for Mrs. Hull call our attention to a line of cases holding that an agent or borrower who is returning from *his* mission, although in accordance with instructions, is acting independently while returning and not as agent: *Brinkman v. Sukerman*, 159 N. W., 316; *Danforth v. Fisher*, 21 L. R. A. (N. S.), 93. But the case at bar can be differentiated from those in that the particular mission in question was originally contemplated by the owner as a part of the journey and was made one of the conditions upon which the husband, the agent, would operate the car and there is the further distinction that a jury could well find that after leaving Vance and Fourth Hull was driving exclusively for the benefit of his wife or for their joint benefit.

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Mrs. Hull also insists as another ground for peremptory instructions that Simmons was guilty of proximate contributory negligence in riding upon the running board of the machine occupied by him at the time of the collision; and it is urged that his case must be assimilated with that of a passenger upon a street car or railway carriage who recklessly assumes a dangerous position. The facts are these: One Knight was the owner or the operator of a jitney bus that passed near Simmons' residence. Upon the date of his injury and while standing at a street intersection he hailed the jitney while on its way into the city and desired to and did become a passenger thereon, his destination being his place of work. The machine was full and he had to stand upon the running board or else await some other mode of transportation. It was while he was thus riding that Hull's machine bumped into the jitney and throw Simmons to the ground. It is also said that he was negligent in thus riding because he had a wooden foot. It was shown, however, that this was so perfectly adjusted that even his intimate friends did not know that he had such a limb.

We are of opinion that it cannot be ruled as a matter of law that Simmons was guilty of proximate contributory negligence, and that this question was properly passed upon by the jury. It is not the case of carrier and passenger; but even in those relations it is not negligence *per se* for a passenger to assume a position upon the platform because of crowded conditions in the car. We overrule Mrs. Hull's assignments of error. •

Hull insists that the Circuit Judge should have given peremptory instructions both because Simmons was riding upon the platform as just stated, and also because the vehicle in which he was riding was not licensed as required by the laws regulating automobiles. It is contended that both the

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operator and the passenger in such machine are trespassers upon the highway and that one can never recover damages for injuries received while so riding. The mere statement of the proposition bears its own refutation. We have wisely adopted the rule that there must be causal connection between the violation of law and the reception of injuries while thus infracting the law; and if it can be seen that the violation of law had no connection with the injuries, it will never be ruled absolutely that the party is guilty of contributory negligence. We think this exact question has been settled against appellant Hull in the case of *Black v. Moore*, 136 Tennessee, 73; *Railway Co. v. J. E. Vaughn*, 1916 E, L. R. A., 1222; see, also, 2 Ruling Case Law, page 1208, where the Massachusetts cases relied upon by learned counsel for Hull are criticized as unsound. We overrule Hull's assignments of error.

The assignments of error of Simmons are, in substance, that the verdict is so inadequate as to indicate prejudice or caprice, and that the Circuit Judge committed error in his instructions to the jury with respect to contributory negligence. We agree with the Circuit Judge that the verdict is inadequate; but we might hesitate to reverse if there were no material errors in the charge.

It is next urged that the judge instructed the jury that if Simmons for any reason took a position on the running board instead of inside the car he would be guilty of contributory negligence such as would disentitle him to recovery; and also that if such negligence, he being guilty of negligence, remotely contributed to the injury the jury should mitigate the recovery; and it is further complained that the Court told the jury that if Simmons was guilty of negligence either in standing upon the running board or in failing to notify the chauffeur of the coming danger if he saw it or could have seen it, the Court charging the

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jury that it was the duty of this passenger as well as the operator to view the street ahead of him and thus keep a lookout for danger, then he could not recover.

We are of opinion that it was not the duty of the passenger as a matter of law to keep a lookout ahead just as the operator does; nor is this duty exacted of the passenger even if the machine is being operated without a license but without his knowledge. We have just held that it is not negligence *per se* for the passenger to ride upon a running board. Hence, the manifest errors committed by the Circuit Judge which may be sufficient to account for the small verdict rendered. It results from the foregoing that the judgment will be reversed and the cause remanded for a new trial in accordance with the views herein expressed. Mr. and Mrs. Hull are jointly taxed with the costs of this Court.

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PARK CITY V. BESSIE OWENS.

Affirmed by the Supreme Court at Knoxville.
(September Term, 1917.)

1. **MUNICIPAL CORPORATIONS. *Maintenance of sidewalks. Taking over after construction by property owner.***

A city which imposes the duty of constructing sidewalks upon property owners may nevertheless be held liable in damages for defects therein.

2. **SAME. *Notice of defects. Defects of original construction.***

It is not incumbent upon plaintiff suing for injuries occasioned by an unsafe street to prove actual notice of the defective sidewalk, if the defect was in original construction; and this rule applies to sidewalks taken over by the city.

3. **SAME. *Duty of city to exercise reasonable care to inspect.***

A municipality which takes over streets and sidewalks built by others is bound to the exercise of reasonable care to see that those streets and sidewalks are reasonably safe.

4. **SAME. *Contributory negligence of pedestrian for jury. When.***

Whether the injured traveler had knowledge of the defect or was guilty of contributory negligence are questions for the jury where evidence of knowledge and appreciation is not clear.

5. **AMENDMENT OF DECLARATION SO AS TO AVER NOTICE TO MAYOR AS REQUIRED BY ACT 1913. *Permissible after motion in arrest of judgment.***

A plaintiff suing a city for personal injuries may be permitted while a motion in arrest of judgment is pending to amend his declaration so as to aver the serving of notice of claim upon the mayor as required by Act 1913.

6. **NONJOINER OF PARTIES. *Matter of abatement. Waiver by general issue.***

The defense of nonjoinder of parties is matter of abatement and is waived by the filing of the general issue.

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7. PRACTICE. *Introduction of Evidence. Private Acts of the Legislature. Judicial cognizance.*

A party desiring to obtain the benefit of a private Act of the Legislature need not offer proof of the Act. He may read it from the published Acts, or the court will take judicial notice of it.

FROM KNOX COUNTY.

Appeal in error from the Circuit Court of Knox County. HON. W. E. DONALDSON, Special Judge.

A. Y. BURROUGHS for Plaintiff in Error.

J. ALVIN JOHNSON for Defendant in Error.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

MRS. OWENS instituted this suit against Park City, a municipal corporation, formerly in existence in Knox County, to recover damages for personal injuries claimed to have been sustained by her in a fall at an intersection of Glenwood Avenue and Winona Street. She averred that at this point the city had wrongfully and negligently placed or had allowed to remain projecting above the level of the sidewalk of concrete a plank some inch and a half or two inches, and had also constructed or allowed to form at that place a deep gully or ditch some three feet wide and twelve inches or more in depth and of rough bottoming, upon which she fell when her shoe heel was caught upon the projecting plank. In addition to this she averred this plank had been covered over with grass and was otherwise obscured. She alleged that the city had actual or

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constructive notice of these defects, but had negligently allowed them to remain and thus caused her injuries.

The case went to trial before the Court and a jury upon a plea of not guilty, resulting in a verdict for \$700.00. Upon motion for a new trial the learned Special Judge, William Donaldson, required a remittitur of \$200.00, which was entered, and thereupon judgment for \$500.00 and costs was entered. The corporation was still not satisfied and took an appeal in error to this Court, and is here making through able counsel many contentions which will be disposed of in their order.

The first error assigned is that the Court should have sustained the motion of the city for a directed verdict. Numerous grounds for urging this assignment are set out in subsidiary assignments. The arguments may be summed up to the effect that there was no evidence upon which there could be rested a verdict that the city was guilty of negligence, or that the officials had actual or constructive knowledge of the defects; that the evidence established the contributory negligence of the plaintiff; and that the record was not in shape to warrant any verdict or judgment against the city.

There was material evidence tending to show the following facts: That the sidewalk in question, although constructed some months prior to the accident by a contractor who had arrangements with the property owner, had passed under full control of the city, and the city had treated it as a part of the town thoroughfare; that there was at the end of this sidewalk an extension of an inch or an inch and a half or two inches of plank which had been used in the original construction of the sidewalk and had remained ever since the sidewalk was built; that some officials of the city had at frequent intervals passed along and over the sidewalk, and had abundant opportunity to

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observe this condition; that there was just beyond the end of the sidewalk and in the direction in which Mrs. Owens fell a deep sink or ditch upon which rough stones had been placed, and that this was a dangerous situation and well known to the city; that upon the day of the injury while Mrs. Owens was returning from lunch to her work in a near-by knitting mill she caught her heel upon this projection and was thrown in the ditch and received serious injuries; that the plank was somewhat obscured by grass, and that although she had walked over the place several times she was not aware of the projection; and that the heels of her shoes were reasonably sound; and it was also shown that she had served upon the Mayor notice of her injuries as prescribed by the Acts of 1913, Chapter 55.

We are of opinion that the evidence tending to how the above justified the submission of the case to the jury, and that the Court was not in error in so doing. It is urged by able counsel that the plank projected only seven-eighths of an inch above the surface and that this could not be treated as an obstruction making the sidewalk unsafe. But this is disputed by defendant in error; and while the evidence of the plaintiff in error is somewhat demonstrative in character, we feel bound to accept the testimony of defendant in error as some evidence showing the projection of some inch and a half above the surface. No one can dispute the proposition that such a projection above the level of a concrete walk renders travel unsafe to pedestrians using ordinary care.

Again, it is urged that there is no evidence that the city officials had any notice of this obstruction. Two answers are suggested by the record. One is that the obstruction had been in the sidewalk for several months, and that some officials, including the deputy marshal whose duty it was to take an occasional survey of streets and sidewalks, had

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passed over the territory and had all opportunities in the world to discover the defect. Another is that this bad place was occasioned while the sidewalk was undergoing construction, and the rule is universal that defects thus occasioned are presumed to have been known to the city. It is urged that this rule cannot apply where the sidewalks are constructed by a property owner without the aid of the city; and we can conceive of cases where this rule should not obtain. But where the city is charged primarily with the duty of providing reasonably safe sidewalks and discharges this function by requiring property owners to undergo the construction and immediately thereafter to throw the place open to public use and to the supervision of the city officials, we do not see why knowledge of defects occasioned by construction should not be imputed to the city. One basis for this can be found in what we conceive to be the duty of city officials who depend upon property owners to make construction to see that proper methods are used; and in addition to that the officials should be operated with the obligation of inspecting sidewalks before acceptance. For the rule ought to be that when the city does accept a highway, it does so with all its imperfections upon its head, as it were: *Chattanooga v. Doyle*, 128 Tenn., 433; *Poole v. Jackson*, 93 Tenn., 62.

With respect to the charge of contributory negligence it suffices to say that the conduct of the defendant in error was not so clearly negligent as to justify the Court in ruling against her as a matter of law. Whether she had knowledge of this defect or should have known of it, and whether she was negligent in her manner of walking were all questions for the jury.

In assignments four and five it is complained that the Court was in error in not arresting the judgment, and also was in error in allowing plaintiff below to amend her

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declaration after a verdict by alleging that she had given notice as required by the Acts of 1913. It is contended that the sending of this notice was a condition precedent to the right of recovery and that it should have been averred in the declaration, and that its absence therefrom made the declaration void; and that it could not be amended after verdict.

We pass over all these contentions except the last. For if we hold that the Court did not commit error in allowing the declaration amended, every possible omission was cured. There can be no doubt of the correctness of the action of the Court in allowing this amendment. This was established so clearly by the case of *Railroad v. Brown*, 125 Tenn., 351, as to be no longer the subject of controversy in this State. This amendment being proper became a part of the original declaration and supplied all the omissions pointed out; and, hence, the plaintiff below must be treated as having complied in fact and in pleading with all the conditions precedent to recovery under the Act of 1913.

It is complained in assignment No. 6 that the Court was in error in allowing evidence as to the conditions of the ditch or gully adjacent to the end of the sidewalk. We see no error in this. While it was not the proximate cause of the accident, it furnished conditions that aggravated the physical injuries of the plaintiff below; and it is manifest that this ditch was a defect.

Assignment No. 7 predicated as it is upon the admitting of evidence of notice to the Mayor under the Acts of 1913 must be overruled.

In assignment No. 8, it is asserted that the Court refused to allow the introduction to the jury of a copy of the published private acts of the Legislature of 1915,

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wherein a vital amendment to the charter of Park City, to be hereinafter noticed, was found. The Court did not allow this to be introduced as evidence, but he did not deny appellant's counsel their legal right to read from these acts as a matter of law. It is not shown that they offered to do so. We surmise from the remarks of the learned judge that had they done so he would have permitted it, for he ruled that the Court would take judicial notice of the contents of the statute.

The basis of assignment No. 9 is that the Court refused as a matter of law to hold that plaintiff below could not maintain her suit because she had not observed a provision of the charter immediately above referred to. This provision is to the effect that when a party sustains injury to personal property by reason of the negligence of another person than an employee of the city, that other person must be joined with the city as a defendant.

We are of opinion in the first place that this was a matter of defense to be urged by a plea in abatement, and that it was waived by filing the general issue. It was clearly a case of non-joinder of parties, which is always a matter of abatement. Again, the assumption should be made in the absence of appropriate plea that the suit was properly instituted and presented, leaving open the questions of negligence and non-negligence.

In addition to all this the record is not clear that any property owner was guilty of negligence with respect to the construction in such way as to make him suable jointly with the city. All that we have is evidence that some contractor built the sidewalk; but whether he was unfit and whether the property owner was guilty of negligence in not actively supervising the construction do not appear so clearly as to justify a ruling against the plaintiff predicated upon the amendment to the Park City charter.

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Assignment No. 10 should have contained the evidence criticized as incompetent; and assignment No. 13 will be disregarded because the special request claimed to have been offered by the city is not embraced in the assignment.

The basis of the twelfth assignment is an excerpt from the charge to the effect that it did not matter whether the defendant built the sidewalk or had it done by a contractor or otherwise if, after the sidewalk was built, the city took supervision and control of it, and if it did so it was under obligation to exercise reasonable care to discover and correct defects from which pedestrians might suffer injury.

We are of the opinion that when applied to the facts of this case the above instruction was not erroneous. We observed in treating of the first assignment of error that a city which takes over parts of highways should in the first instance exercise some degree of care toward ascertaining the condition of the thoroughfares. Besides, the reasonable construction of this charge is that regardless of the original building of a sidewalk, a city which assumes control of it is merely burdened with the duty of exercising reasonable care for its safety to a reasonable extent.

We see no error in the proceeding and affirm the judgment of \$500.00. It is urged by learned counsel for appellee that the \$700.00 verdict should be restored. But we fail to discover an appeal and an assignment of error to this effect. In the absence of these steps in procedure we cannot correct any alleged errors that might have been committed in requiring a reduction of the judgment. Plaintiff in error will pay the costs.

Railway & Light Co. v. White.

NASHVILLE RAILWAY & LIGHT CO. v. FELIX WHITE. .

Writ of certiorari denied by Supreme Court.

1. **ELECTRICITY.** *Duties of parties using.*

The law exacts of those using electricity in and about streets and other public places to exercise the highest degree of care to prevent its escape to the injury of the person or property of the citizen.

2. **SAME.** *Street car rail charged with. Negligence.*

It is negligence for a street car company using electricity as its propelling power to allow the rails of its tracks to become charged to that degree which imperils the safety of those lawfully upon the streets.

3. **SAME.** *Presumption of negligence. Res ipsa loquitur.*

A presumption of sufficient force to carry a case to the jury arises where it is shown that horses standing in water covering a street car track were shocked and killed by electricity discharged by the rails lying in the street.

FROM DAVIDSON COUNTY.

Appeal in error from the Davidson Circuit Court.

ROBERT F. JACKSON for Plaintiff in Error.

JORDAN STOKES, JR., for Defendant in Error.

PRESIDING JUSTICE WILSON delivered the opinion of the Court.

Railway & Light Co. v. White.

THIS is a suit by defendant in error to recover from plaintiff in error the value of two horses, which he alleges were killed by electricity negligently permitted or allowed to come in contact with his horses.

The suit was commenced before a justice of the peace of Davidson County. The warrant or summons issued by the justice of the peace occupies over a page of the type-written transcript, and is as full as if it had been filed as a declaration in a suit instituted in the Circuit Court. The substance of it, so far as need be stated, is, that defendant in error is engaged in the moving or hauling business, and January 13, 1913, one of his teams was being used in moving some parties from their home on Jo Johnston Avenue, in Nashville, to a place out of the back water, and that the driver of the team, after the wagon was loaded, started to drive off with his load, and the horses came upon the track of the plaintiff in error at one of its switches, and, upon stepping upon the tracks, they received a violent shock of electricity which caused them to fall dead, and the negligence alleged on the part of the company is, that it permitted its tracks to become so charged with electricity as to kill the horses when they came in contact with its tracks.

The justice of the peace rendered judgment against the company for \$400.00 and the cost, and it appealed to the Circuit Court of the county. The case was tried in the Circuit Court April 14, 1913, before Hon. G. B. Kirkpatrick, sitting as a special judge without a jury. He found the issues in favor of Mr. White, and rendered a judgment in his favor, as did the justice of the peace, for \$400.00 and the cost.

The Railway & Light Company moved for a new trial, which, being overruled, it appealed in error to this Court.

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It assigns the following errors, in brief, in this Court:

1. No material evidence to support the judgment of the Court below.
2. The judgment is contrary to the undisputed testimony in the case.
3. The judgment is against the great preponderance of the evidence.
4. The Court should have granted appellant a new trial, because its findings of fact conclusively show that there was nothing out of fix with any part of its track, trolley wires or any other part of its electrical equipment, at the time and place of the accident, or at any other time or place, that had any connection whatever with, or was in any way responsible for, the death of the horses in question.
5. The Court erred in not granting it a new trial because the uncontradicted expert testimony in the case shows that it was impossible for the horses to have received an electrical shock under the conditions shown to have existed at the time and place of the accident.

Two, and but two, essential questions are raised by these assignments of error.

The first is: Is there material evidence to support the findings of facts made by the Circuit Judge, he having tried the case without a jury, he having been requested to reduce his findings of fact to writing.

The second is: "Is his findings of the determinative facts so contradictory in their legal import, that they afford no proper basis for a judgment against plaintiff in error,"

The trial judge found, briefly stated, the following facts:

1. That January 13, 1913, back water from the Cumberland River overflowed Eleventh Avenue, North, and Jo Johnston Avenue to a depth of from two to three feet,

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necessitating the removal of certain persons from their residences.

2. That, on the date aforesaid, defendant in error owned a moving van and also a pair of gray horses worth \$400.00, and had said team and van or wagon moving people from the flooded territory, and on the day aforesaid he had placed his team and wagon under charge of his driver on Jo Johnston Avenue, near Eleventh Avenue, North, to move the household effects of a family living on the south side of Jo Johnston Avenue near Eleventh Avenue, North; that the driver had backed the wagon and team against the curbing of Jo Johnston Avenue opposite the home from which property was to be taken, and which had been loaded into the wagon, and while the wagon was being loaded, the heads of the horses were being pointed north, the horses and the wagon being on Jo Johnston Avenue, which placed the horses near the middle of said avenue, over which the tracks of the Railway & Light Company were laid, and said tracks being under water two or three feet, so they could not be seen.

3. That the van or wagon of defendant in error had been loaded and the driver of the team commanded the team to move out, and the team pulled out from the curbing three or four feet, when, suddenly, both horses reared up on their hind feet, lunged forward, and immediately fell into the water, the head horse falling a few seconds before the off horse, and both horses became submerged in water, their head and legs being entirely under water from the moment they fell, only small parts of the sides of each horse showing above the water at the point where both fell, the horses having fallen on their sides.

4. That after the horses reared up, lunged, and fell into the water, neither one of them made any effort or struggle of any kind whatever to get up, or to get loose from their

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position under the water, nor were there any struggle or bubbles that came from the water at the point where the heads of the horses were lying under the water, and that no examination was made of the horses to ascertain the cause of their sudden death.

5. That a witness for plaintiff (below) Charley Reeves (colored) was in the water aiding in the removal of other persons in this flooded district seventy-five feet from the point where said horses fell, and was looking at the horses when they fell, and he immediately waded through the water to the point where the horses were lying, and when he got there, they were dead, and he took hold of the breast chains or strap of one of them and received such a strong electrical shock that it threw or pulled him loose from the strap, and he then climbed upon the wagon tongue and went out through the wagon, but received no other electrical shock, except the one received when he took hold of the said breast chain at the time when he first reached the horses after they had fallen.

6. That the temperature of the weather on the day and date aforesaid varied, the highest being forty-eight degrees and the lowest twenty-four, the average for the day being twenty-seven degrees, and that the temperature of the water was about fifty, and that it was a cool day, and that the freezing point is thirty-two degrees.

7. That the company was running its cars on its tracks on Jo Johnston Avenue on the day of the accident, January 13, 1913, regularly from its transfer station in the city to the point of the submerged car track on Jo Johnston Avenue, and from this point it was transferring its passengers by wagons of the Bennett Livery Company over the submerged track to the opposite side, where it had one of its cars that made its regular trip every fifteen minutes to the

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end of Jo Johnston Avenue street car line, to the point where its said track was submerged, and that said livery company would carry back and forth passengers for the street car company over the submerged part of the car track of the company over Jo Johnston Avenue, its cars not being able to run over this part of its water flooded track, and said livery company, in view of the temperature of the weather and coldness of the water, changed its teams every two hours during the day.

8. That January 13, 1913, the day the horses of plaintiff below died, the livery company aforesaid were employed by the Railway & Light Company to transfer, and it did transfer, the passengers of the Railway & Light Company from one car to another over the submerged track aforesaid, and on the day of the accident, on the death of the horses of plaintiff below, said livery company was transferring passengers from Twelfth Avenue, North, and Jo Johnston Avenue, and not at Eleventh Avenue and Jo Johnston, the point nearest to where said horses fell into the water as before stated.

9. That after the water receded from the place where said horses fell, about five days thereafter, and while said horses were still lying in the street practically in the same position as they had fallen, and being connected with the wagon, agents or employes of the Railway & Light Company went to the place of the accident, took hold of the horses and harness on one of the horses, and also of the wagon tongue and received no electrical shock, and said employes made a careful examination of the track, the rails, the trolley wire, the wires on the poles, the bonds between the rails, and found them all in perfect condition, and that from the condition in which they found the tracks, rails, trolley wire, wire on the pole, and the bonds between the rails, there could have been no shock which would have

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been felt, or brought about the death of the horses belonging to plaintiff below.

10. That at the point opposite from where the van or wagon of plaintiff below was being loaded, the Railway & Light Company had a switch on Jo Johnston Avenue for the purpose of allowing its cars to pass each other in going in opposite directions, and that the inner rail of the track nearest to the curbing against which the wagon of plaintiff below was backed is about eight feet from the curbing, and, also, that about opposite the point where the horses were standing, there is a pole on which a wire of the Railway & Light Company is placed, and on this pole is a transformer at or near the top, and connected with this transformer is a wire which leads into the ground beneath, running down said pole, which allows the escape of excessive electricity from said transformer when the voltage carried by said wire is wished to be reduced.

11. That four or five days after the accident an employe of the Railway & Light Company went out to the scene of the accident and climbed this pole, and did something to the wire—that is, did something to the wire connected with the transformers and leading down into the ground.

12. That no inspection or examination was made by anyone, either the plaintiff or defendant, or the employes of the latter, of the tracks, wires or rails at the point where the said horses fell, until after the water had receded from the track, which was at least four or five days after the death of the horses, other than the experience that Charley Reeves had at the time of the accident heretofore found and stated.

13. That the voltage or electric shock needed to kill a horse or animal is less than the amount of voltage required to kill a man.

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14. That the current of electricity which is generated at the power house of the company used in propelling its cars goes first over the trolley and from the trolley through the car to the track below, and that the trolley wire is in no way connected with the electric wire on the pole to which is affixed transformers used for the purpose of reducing the high voltages of electricity, which has been heretofore described and found by the Court.

The learned special judge, after finding the foregoing facts, states in his written findings that the case had given him a great deal of trouble, and that much of it could have been cleared up, but for the fact at the time of the killing of the horses, the tracks of the company were submerged in water, and the horses themselves remained unexamined as they fell until the water receded from them, or five days thereafter, which prevented any inspection of the track or wires, or any examination of the horses after their death, at a time when such examination should have been made.

But further says His Honor: "It is evident that the horses died from some very unnatural cause, and that their death was almost instantaneous; the defendant was running its cars back and forth on its tracks on Jo Johnston Avenue from its transfer station to the end of its line on said street, with the exception of the submerged part of Jo Johnston Avenue heretofore found by the Court. That the currents of electricity, with the proper voltage, were sent out on its wires from its power house needed to operate its cars and to furnish lights to its customers, and this was the condition of its wires, January 13, 1913, when said horses met their death, and that if there had been any down wire, or any wire by which the transformer, or the trolley wire, could be, or was connected with, the rails on which the horses may have stood or with the horses themselves at the

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time of the accident, they could have received such a shock as would have brought about their death."

"The Court is driven to the opinion, from all of the facts and circumstances growing out of the evidence introduced, both by the plaintiff and by the defendant, that there is such a presumption of negligence against the defendant company that it must be rebutted, and that the rule of law, *res ipso loquitur* applies in this case."

Thus finding and holding, His Honor rendered judgment against the company as before stated.

The company requested the Court to find five additional facts as follows, in substance:

1. That the horses in question had been standing at the scene of the accident in water up to their bellies for about two hours before the accident occurred.

2. That the Court further finds, as a fact, that, after the water subsided, which was four or five days after the accident, and before the horses had been moved from where they had fallen, and while the harness was still on them, defendant's Division Superintendent, C. B. Bailey, caught hold of one of the horse's tongue, and also the harness, and besides put his hand on the horse's body, and also, on the tire of the wagon to which the horses were then hitched, and felt no electric shock whatever.

3. That the Court further finds, as a fact, that Dr. E. N. Brown, a veterinary surgeon, also saw said horses a few days after the accident occurred, and after the water had subsided, and before they had been moved from where they had fallen, and put his hand on the mouth of both of them and got no shock whatever.

4. The Court further finds, as a scientific fact from the uncontradicted expert testimony in the case, that, if

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there was any electricity from the track, or any other point, and it came in contact with the horses as they lay dead on the track, it would charge their bodies and the metal in the harness, and would be felt by a person touching the horses or the metallic part of the harness after the water subsided and before they were removed from where they had fallen, because the current of electricity would pass from the dead bodies of the horses and the metallic part of the harness to the person, and then to the earth.

5. The Court further finds as a fact, that about a week after the accident, one of the employes of defendant company went up a pole that had a transformer on it and he was working with the ground wire underneath the transformer, but he did not cut it. He did not know what the employe was doing with it. The wire he was handling is one that comes down the pole and goes into an iron pipe and into the ground. The transformer is not connected with the trolley wire, or the track, but is used for the purpose of reducing the high voltage as it comes through the transformer to that point where it would be safe to use it in homes and business houses, and for commercial purposes generally.

His Honor, the trial judge, declined to find these additional facts requested, further than that he found the horses on the day and date of the accident were in water up to their flanks for a period not exceeding an hour.

He further modified his former finding on page 6 thereof, but in no wise changing the effect of his original findings.

We have thus set out, in full, the findings of the trial judge of the full, forcible and exhaustive arguments and briefs made and furnished by the industrious young counsel and representing the parties, and because it is earnestly

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insisted by the counsel of appellant that the judgment of the Court is contrary to its written findings of fact in the case.

It is settled law in this State, as well as in most of the other States of the Union, that street car companies using the subtle and dangerous element of electricity in conducting their business in and along the streets of cities, while not insurers of the safety of the public on the streets, are held to the highest degree of care, skill and diligence in constructing their lines and in maintaining them in repair, so as to make the same safe against accidents, so far as such safety can, by the use of such care and diligence, be secured.

The Court in *Denver Cons. Co. v. Simpson*, 30 L. R. A., 566, used this emphatic language:

“Where all minds concur, as they must in a case like the one we are considering, in regarding the carrying on of a business so fraught with danger to the public, inherent in the nature of the business itself, the Court makes no mistake in defining the duty of those conducting it as the exercise of the utmost care. It was, therefore, not prejudicial error for the Court to tell the jury in the case what the law requires of the defendant, to-wit—the *highest degree* of care in conducting its business.”

See, also, *Girandi v. Electric Co.* (Cal.), 48 Am. St. R., 114; *Block v. St. Ry. Co.* (Wis.), 46 Am. St. Rep., 249; *Haynes v. Gas. Co.* (N. C.), 41 Am. St. Rep., 786.

In *Girandi v. Electric Co.*, *supra*, the Court said:

“The public, aside from the consumers using the commodity, owe no duty to those introducing it. But, on the other hand, it is the duty of those making a profit from the use of so dangerous an element as electricity, to use

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the *utmost* care to prevent injury to any class of people composing the public, which consists in considerable numbers. They must protect those having less than the ordinary knowledge of the character of the commodity.”

In *Hayes v. Gas Co.*, *supra*, the Court said:

“It is due to the citizen that electric companies that are permitted to use for their own purposes the streets of a city or town, shall be required to use *the utmost* degree of care in the construction, *inspection* and *repair* of their wires and poles, to the end that travelers along the highway may not be injured by their appliances.”

“The danger is great and care and watchfulness must be commensurate with it. All the reasons that support the rigid enforcement of this rigid rule against the carrier of passengers by steam apply with double force to those who are allowed to place above the streets of a city wires charged with a deadly current of electricity, or liable to become so charged. . . . The requirement does not carry with it too heavy a burden.”

In *Cook v. Washington City Electric Co.*, the Court said:

“The law requires that they, referring to electric companies, should use *every way* to protect and save the public from loss or injury. They must use every means regardless of expense, to protect and make safe the public or citizens passing over the streets of the city, who are not aware of danger. They must use due care and ordinary diligence in such case, with the legal meaning in law following and attached to such words. The words ‘usual and ordinary care’ means in such cases, nothing more or less than if there be a great danger and hazard in the business, there should be a corresponding degree of skill and attention required by the law.”

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Mr. Keasby, on Electric Wires, thus states the rule:

“The use of the electric current is authorized by law. It will do no harm if it is kept in its proper place, but it is very dangerous if it is allowed to escape. Those who use it are charged with a public duty to use the *greatest care* to keep it from doing harm, and for failure to observe this care, they are responsible to persons using the public streets, who may be injured without any fault of their own.” Keasby on Electric Wires, Sec. 243.

Joyce, on Electricity, uses this language in stating the rule:

“An electrical company is under the duty of so maintaining its wires as not to interfere with the free, unobstructed and safe use of the highway. Although it is not an absolute insurer of its wires, yet it is bound to use the *utmost* care in maintaining them.”

All the above quotations are found approved in the opinion of the late Justice Wilkes in *Street Railway Co. v. Kartright*, 110 Tenn. (2 Cates), 277-286.

We refer to the following additional authorities in support of the rule, that electric light companies and electrical railroads are bound, with respect to the public, to exercise the *utmost* degree of care in the construction, inspection and repair and in operation of their apparatus and appliances: *Perham v. Gen. Elec. Co.*, 53 Pac. Rep., 14; *Snyder v. Elec. Co.*, 43 W. Va., 661; *McKay v. Bell Tel. Co.*, 111 Ala., 337; *City Elec. St. Ry. Co. v. Conovy*, 61 Ark., 381; *St. R. Co. v. Owings*, 97 Ga., 663.

If time permitted, it is believed that numerous other authorities could be cited in support of the rule above stated.

With the stringent rule of liability governing the duty of companies using electricity as a motive power, carrying

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deadly or dangerous currents, we are prepared to take up and dispose of the assignments of error. In doing so, we will not follow the order in which the assignments are stated.

It is earnestly contended in the brief of counsel of appellant company that the doctrine or *res ipsa loquitur* invoked and relied upon by the learned special judge in reaching his conclusion that it was liable, has no application to the case under the facts.

The rule has, or has not, application as a central and controlling fact, as it may, or may not, be found established by the evidence. If it be a fact that a deadly current of electricity, put in motion or allowed to escape from its usual and proper channel, killed the horses in question, then it may be said that the rule of *res ipsa loquitur* comes into play. Literally speaking, *res ipsa loquitur* means, "The thing speaks for itself; the meaning or intent is apparent. Anderson Law. Dict., 888.

So, if it be found, as a fact, that a deadly current of electricity from its plant killed these horses, the fact itself carries its intent and meaning; or, to use the literalism of the rule, spells actionable negligence on the part of appellant; and to avoid liability it was incumbent on it to show that its deadly agent escaped, notwithstanding it had used the greatest care and diligence to keep it harnessed and traveling along proper and safe routes.

It is also argued, with much force and plausibility, that the findings of fact by the learned trial judge are contradictory among and between themselves, and, under his findings, no liability attached to appellant. We cannot assent to this view of the findings. We have set them out in full in this opinion, and when they are correctly analyzed it is believed that no conflict in them, in a legal sense, will be discovered.

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The underlying fundamental all-controlling fact in the case, in the absence of other and satisfactory proof removing its legal consequences, is, "Did a current of electricity, turned loose by appellant, or allowed to escape from harness by it, kill the horses?"

We think there are facts in evidence in the case from which a reasonable mind might draw the inference that the horses were killed by a current of electricity. If this be so, there is some material evidence to support the judgment of the trial Court, and, hence, nothing else appearing, the first assignment of error must fall down. Beyond dispute, the horses, as their driver started them to pull the wagon away after it received its load, and as they were on, or about on, the rail of the track of the company, or in the act of stepping on the rail of the track or that of the company's switch, about in front of where they had been standing up to their flanks in the very cold water for over in the water and died in a few seconds.

There is proof tending to show that, instantly, as the horses reared up, they fell dead in the water without a struggle.

There is also proof tending to show that the horses did not struggle after they fell in the water.

The theory of the plaintiff below was that, as the horses were started off by their driver, a current of electricity generated by appellant company came in contact with them and instantly killed them.

The theory of the company was that the horses had been standing up to their flanks in the very cold water for an hour or more; that their legs had become "numbed," and, hence, when the driver pulled them to start down the street, the legs of the head horse gave way, causing him to fall, and in his fall he pulled the other horse down with him, and both were drowned.

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We are not here concerned with the question as to the weight of the proof bearing upon and strictly relative to these two theories. All we need say is, that there is material evidence to support the former theory.

A case rather closely analogous in its main fact to the case at bar, assuming that these horses here came in contact with a current of electricity, is *Clark v. Electric Co.*, 6 Am. Elec. Cas., 234.

In that case a horse stepped on the rail of a trolley road and instantly fell to the ground in a dying condition, and the driver, handling a metallic portion of the harness, received a shock, and it was held to be *prima facie* proof of defective insulation and of negligence rendering the company liable for the value of the horse.

It is urged upon us and with great earnestness and force, that the trial judge should have found as requested in the second, third, fourth and fifth requests for additional findings of fact presented to him.

This was a matter addressed to the trial judge, and it was not incumbent upon him to find as requested, unless he believed, upon a review of all the evidence, that the requests embodied facts thus established. In other words, we know of no rule of law, that imperatively requires a jury, or a judge sitting as a jury, to believe that the testimony of a witness or witnesses, establishes a fact, or facts, although the witness, or witnesses, be not impeached or directly contradicted, in the face of countervailing testimony.

After a careful review and consideration of the evidence in this rather novel case, in connection with the findings of facts made by the learned trial judge, and the applicable law, we cannot say that there is any reversible error in the judgment of the Court below, and it will be affirmed with costs.

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SOLVENT SAVINGS BANK v. ANNIE VANCE.

Writ of certiorari denied by Supreme Court, 1917.

1. **LANDLORD AND TENANT.** *Liability of former for personal injuries received on defective premises where landlord has promised repairs.*

A tenant of premises leased with simultaneous promise of landlord to repair may recover in an action upon such contract for personal injuries received because of defects in the premises.

2. **SAME.** *Extent of contract to repair. Exception to general rule.*

The rule in general is that a tenant suing for personal injuries received through defective premises and averring breach of contract to repair must go further and show that the agreement was also to *keep* the premises in repair. But a case to be excepted is where the tenant is injured within a brief period after taking possession.

3. **SAME.** *Assumption of risk by tenant. Contributory negligence. Continued occupancy.*

A tenant should not as matter of law be held to have assumed the risk or as guilty of contributory negligence by continuing the occupancy of premises which the landlord has expressly agreed to repair within a fixed period or a reasonable time. But this is always pertinent as a matter of *fact*.

4. **SAME.** *Rule announced in Hines v. Wilcox approved.*

The case of *Hines v. Wilcox*, 100 Tenn., 538, with respect to duties of landlords is cited with approval.

5. **SAME.** *Reciprocal duty of landlord and tenant.*

While it is the duty of a tenant entering upon leased premises to exercise reasonable care, this duty and that of the landlord are not equal. The tenant may to some extent rely upon the superior knowledge of his lessor.

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6. **SAME.** *Contract to repair must precede or accompany the leasing and taking of possession. Agreement thereafter not effectual.*

A tenant suing for injuries received from defective premises must aver and prove that the agreement preceded or was part of the lease and was stipulated before taking possession. But this rule will not obtain where the entry is permissive and during the pendency of negotiations.

7. **EVIDENCE.** *Assurance of safety. No necessity for pleading.*
An injured tenant may without special averment introduce evidence of an assurance of safety given by the landlord.

FROM SHELBY COUNTY.

Appeal in error from the Circuit Court of Shelby County. J. P. YOUNG, Judge.

ANDERSON & CRABTREE and W. S. SETTLE for Plaintiff in Error.

WILSON & ARMSTRONG and J. E. HOLMES for Defendant in Error.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

THIS is an action by a tenant against her landlord to recover damages for personal injuries claimed to have been sustained by reason of defects in the demised premises. She recovered verdict and judgment for \$600.00. The proprietor has appealed and assigned errors.

Plaintiff below in her first count averred that in February, 1915, she had leased the premises in question from the defendant at a stipulated rental, and that a part of the contract of letting was that the owner was to put the prem-

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ises in a reasonable state of repair and keep them so; that there were on the premises at the time a series of defective steps attached to the back porch that were old, decayed and dangerous; that this was known to the defendant, or would have been known had it exercised reasonable care to have found out; that plaintiff was not aware of this defect, and that in consequence she went upon the steps, from which she was precipitated to the ground and sustained serious personal injuries. She averred in her second count that the defendant was guilty of negligence when it leased her the premises in a dangerous condition with knowledge thereof, actual or imputable.

The pleas were of the general issue and contributory negligence.

The basis of the first assignment of error is two excerpts from the charge of the Court. The first is in substance that the Court told the jury that if plaintiff had prior to the accident rented the house from the defendant Bank, and that at the time of the rental there was an oral contract by the terms of which the owner of the premises had entered into an agreement to put the premises in repair, and to so maintain them in a suitable and safe condition, and if they further find that plaintiff while descending the steps in the exercise of due care the steps fell and she was injured because of their defective and unsafe condition, and that this condition was known to the owner, or could have been known by the exercise of reasonable care, then plaintiff was entitled to a recovery.

The second portion of the first assignment is based on a refusal of the Court to give in charge a special request to the effect that if plaintiff and defendant had entered into a leasing contract whereby the defendant had agreed to put the same in safe and suitable condition while occupied by the plaintiff, and that if they found that the defendant

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breached said contract by failing to put said premises in a safe condition for occupancy, and if the plaintiff knew defendant had breached this contract and that she knew the premises were dangerous and continued to occupy them with that knowledge, then she could not recover.

The first criticism is that the Court was not warranted in submitting the theory of the first count to the jury because there was no evidence tending to show an agreement to repair made at the time of the lease. While the evidence of the plaintiff below is somewhat conflicting, there are statements of hers to the effect that she called the representatives of the bank upon the telephone and got permission to enter as a tenant, the bank at the time agreeing to put the premises in a state of repair, and also that in a short while the agents of the bank were out at the house and directed repairing to be done with the view of determining the amount of rent which the plaintiff was to pay.

The jury might infer from this evidence that there was an agreement to repair contemporaneous with the letting.

The next criticism is that under the law there can be no recovery for personal injuries by reason of a breach upon the part of the landlord to keep premises in repair. This question, which has been much mooted, has been finally settled in Tennessee in favor of the tenant as against the landlord. *Storage Co. v. Miller*, 135 Tenn., 187.

It is also urged that an agreement entered into after the lease cannot be made the basis of a recovery as for breach of contract. This is upon the ground that the subsequent promise is without consideration. The proposition seems to be generally accepted as true. But the jury were warranted in concluding that the agreement to repair was incorporated in and became part of the contract.

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It is also said that it is not sufficient for the tenant to show originally an agreement to repair, but that the obligation must extend to maintenance during the term. This is likewise a rule which is accepted in general. We apprehend, however, that there must be an exception in cases where the injury takes place within a brief period after the beginning of the tenancy under a contract to repair. And we so hold.

With respect to the failure to give the special request, it suffices to say that in the absence of a time limit in which to make repairs promised, the tenant cannot, as a matter of law, be convicted of contributory negligence nor held to have assumed the risk by continuing occupancy. *Graff v. Brewing*, 109 S. W., 1044. But these are always pertinent matters of fact.

In the second assignment it is said that the Court was in error in setting forth the theory of the plaintiff and the defendant's liability under the second count in the following manner:

"That if the jury found that at the time the premises were let the steps were in a dangerous condition, and that this was known to the defendant or would have been known had it exercised reasonable care, and that plaintiff attempted about the 20th of April to descend said steps in the exercise of due care, and that while so doing said steps gave way and caused plaintiff to fall and injure herself, and that if the jury further found that defendant in allowing said steps to be and remain in said unsafe condition was not in the exercise of due care for the safety of plaintiff as a tenant, but was guilty of negligence, and that if the jury found that the unsafe condition of said steps and the negligence of the defendant in so allowing them was the direct and proximate cause of the plaintiff's injury, then there should be a recovery by her. But if on the other

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hand the steps were found by the jury not to be in an unsafe condition, or if at the time of said rental defendant did not know or by the exercise of due care could not have known of said unsafe condition, then the verdict should be for the defendant."

This charge is substantially in accordance with the case of *Wilcox v. Hines*, 100 Tenn., 538. This decision has been assailed all over the country, but it stands unshaken in this jurisdiction. In truth, this decision was timely, and is in keeping with the upward trend in this country toward the betterment of tenement houses and leased premises. We are persuaded that it is both legal and ethical that the owners of premises who are in the business of leasing indiscriminately should be active and diligent to see that occupants are not exposed to unnecessary dangers. There is no justification for the maintenance of death traps.

In a sub-section of this second assignment appellant complains of the refusal of the Court to give in charge a special request to the effect "that in the absence of a guaranty or assurance of safety the landlord is not an insurer of the premises; that he is required to exercise reasonable care to ascertain the condition of the premises, and that the tenant is likewise required to exercise reasonable care to ascertain the condition of the premises he rents; so that in the absence of contract if the premises were let when defective and dangerous, and the defendant by the exercise of reasonable care should have known it, and if the plaintiff likewise by the exercise of the same reasonable care on her part should have known it, that plaintiff could not recover for the reason that she is required to exercise the same care as is her landlord, and the verdict should be for the defendant."

This special request contains some sound propositions of law, but it is not in every particular correct, and hence

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its refusal was not reversible error. We are of opinion that the duties of the tenant and the landlord with respect to the premises are not identical, and that the tenant may to some degree rely upon the superior opportunities possessed by the landlord. *Wilcox v. Hines, supra*. If as a fact their duties were equal, there could be no recovery for merely defective premises, and the rule making the landlord liable would be futile. We overrule this assignment of error.

In the third assignment it is said that the Court was in error in not stating the reciprocal duties of plaintiff and defendant. We are persuaded that the Court from time to time placed upon the plaintiff virtually the burden of disproving contributory negligence; at least he made it plain that if she knew of the defect or could have known of it by the exercise of reasonable care, she should not be permitted to recover. This was more than enough.

The basis of the fourth assignment was the refusal of the Court to give in charge three special requests, the substance of which will now be stated and disposed of separately.

(1) The Court is requested to charge that unless the jury found by preponderance plaintiff rented the house from the defendant, and that at the time she so rented the defendant agreed to put the same in safe and suitable condition for occupancy, the jury should resolve the issues of the first count in favor of defendant; and that with respect to the second count unless the jury found by preponderance of the evidence that the premises were rented by plaintiff from defendant before she moved into or occupied the premises, the verdict should be for the defendant, for the reason that the entering into the contract to repair must be made before removal to the premises.

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That portion of this request which may be said to refer to the first count was substantially given by the Court. Upon reading the instructions we find that the Court placed emphasis upon the fact that plaintiff must show the making of the contract to repair at the time of the letting.

With respect to the latter portion of this request it suffices to say that it ignores one theory arising from the evidence, namely, that the negotiations were begun over the 'phone with promise to repair, and were not completed until after she had entered. This request also ignores the fact that the rents were fixed with reference to repairs, and also that it was a monthly letting. We are of opinion that these facts differentiate this from the general rule that a party who goes into possession without a contract takes the risk, and also that when there is a letting from month to month and a continuance upon the strength of promises to repair, there is a ground of blame if the landlord does not so repair. *Good v. VonHemert*, 131 N. W., 466.

(2) It is complained that the Court refused to charge that if the plaintiff found the premises vacant and moved into the same without a contract, she could not recover. What we have said immediately above might be sufficient to dispose of this criticism. For if after the bank found her it entered into a contract with her to repair and fixed the rent with reference thereto, and if she remained instead of going away in the expectation of repairing, then she should recover notwithstanding her entrance in the absence of a contract.

We shall remark that we are persuaded that her theory is sustained by the greater weight of the evidence. The President of the Bank involved himself in all sorts of contradictions, as also did the carpenter who assured plaintiff as she says that the steps were safe; and because of this mixture of statements the jury were warranted in dis-

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crediting the whole contention of the defendant as to her entry without authority.

(3) Complaint is also made that the Court failed to charge that if plaintiff moved in with the consent of one McCalloway, who was acting for himself and not for the defendant, the verdict should be for the defendant, notwithstanding McCalloway may have contracted to have put the premises in safe condition.

We do not think reversible error was committed in refusing this. We do not believe plaintiff disentitled to recovery notwithstanding her entering by consent of McCalloway. It cannot be disputed that at some time she became the tenant of the bank, and of course there was an expressed or implied contract with the latter at that time. It might be said that the new arrangement superseded the old one, and that it would have been an injustice to the plaintiff to have denied her a recovery merely because she had negotiations with McCalloway.

The basis of the fifth assignment was the refusal of the Court to strike out evidence to the effect that the bank president and his carpenter gave plaintiff assurance that the steps were safe. The main reason why this is said to be error is that there is no such averment in the declaration. We are of opinion that it was competent both as tending to support the contract averments of the first count and also as directly bearing upon the question of contributory negligence.

We have carefully examined this record and see no substantial reason why it should be reversed. We therefore direct an affirmance with costs.

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PAUL HOFFMAN v. A. P. JONES ET AL.

1. EXECUTORS. *Compensation. Amount fixed by will governs.*

A nominated executor who accepts the trust is bound by a provision limiting his percentage of compensation.

2. SAME. *Compensation from one estate for services performed in administering two not permissible.*

It is not permissible to charge against one estate the compensation of a personal representative in administering another, although closely interwoven.

FROM DAVIDSON COUNTY.

Appeal in error from the First Circuit Court of Davidson County.

J. H. TURNER for Plaintiffs in Error.

J. H. ZARECOR for Defendant in Error.

PRESIDING JUSTICE WILSON delivered the opinion of the Court.

THIS case is before us upon an appeal by both litigants from the action of the Circuit Court of Davidson County, allowing and disallowing certain credits claimed by A. P. Jacobs as executor of the last will and testament of Mrs. Louisa M. Johnson.

Jacobs, as executor, made what purports to be a final settlement before the Clerk of the County Court of Davidson County.

Paul and Fred S. Hoffman and Francis M. Rooney, brothers and sister of the testatrix, Mrs. Louisa M. John-

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son, and interested in her estate as disposed of by her will, excepted to five items of credit claimed by the executor in his settlement before the County Court Clerk and allowed.

It appears that all of the exceptions were abandoned in the County Court except the third and fifth. The third exception was to a credit of five hundred dollars allowed by the clerk because

1. No voucher was produced.
2. Because said sum was allowed for services rendered in closing out the lumber business of Sam S. Johnson and looking after the finances of Mrs. Louisa M. Johnson's interest was unwarranted by law.

The fifth exception was to the allowance of \$654.44 for services of the executor as such in performing his duties under the will, because the allowance is excessive, in fact, and because the will of Mrs. Louisa M. Johnson expressly provided that her executor should be allowed only two per cent commission, whereas the clerk allowed five per cent.

Both of the aforesaid items were allowed in the County Court, and Paul and Fred Hoffman and Frances H. Rooney appealed to the Circuit Court.

It appears that considerable evidence was heard in the Circuit Court, and the cause came on for hearing in that Court before Hon. A. G. Rutherford, Special Judge. He overruled the assignment of error complaining of the allowance of five hundred dollars to the executor, and sustained the exception to the allowance of \$654.44 for services of the executor.

Both parties moved for a new trial, which motions were overruled, and both parties appealed in error to this Court. The essential complaint of the executor is, that the Court below erred in declining to allow him a credit of \$654.44

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for services as executor, instead of allowing him only two per cent, making a difference of \$339.27.

Paul and Fred Hoffman and their sister assign as error the action of the Circuit Court in allowing a credit of five hundred dollars to the executor specified in their third exception to the report and statement made before the County Court Clerk. Without going into any discussion or citation of the evidence, we are thoroughly satisfied that the learned special judge was entirely correct in his action upon the exception to the allowance made by the County Court Clerk to the executor as commissions for his services.

The will of the testatrix, under which Mr. Jacobs accepted the trust, expressly provided after naming Mr. Jacobs as executor, that he should have entire charge of her estate and be authorized to administer it without bond, and that he should receive two per cent commission for his services.

Having accepted the trust, he is bound by its terms. He could have declined acting as executor, and the Court would then have appointed someone as administrator with the will annexed.

The law, it appears, is well settled that a testator has the right to fix in his will the compensation that his executor shall receive. Under the old law, the executor or administrator of an estate was entitled to no compensation for personal services as against creditors.

The statutes of most of the States and of Tennessee now provide reasonable compensation, and exceptions to these are first, such as arise from contracts express or implied, as where an executor or administrator agrees to serve without compensation, or for a stipulated amount. Pritchard on Wills, Sec. 790.

So, the authorities seem to be almost unanimous to the effect, that, if the instrument creating the trust fixes the

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compensation, or declares that none is to be received, the compensation fixed by it will be the rule of allowance to the trustee, and cannot be changed by the Court. 39 Cyc., 493.

We could multiply authorities almost indefinitely supporting the above rule of law. The only remaining question is as to the allowance of five hundred dollars to the executor embraced in the third exception to the report and settlement made before the County Court Clerk.

We feel constrained, under our view of the law, to sustain this exception and to hold that the County Court Clerk, as well as the learned special Circuit Judge, was in error in allowing this credit.

It seems to have been predicated upon services rendered by Mr. Jacobs in connection with the affairs of the estate of Sam S. Johnson.

The estate of Sam S. Johnson had a regular representative in the person of one Mr. Walker. And while Mr. Jacobs looked after the interest of Mrs. Louisa M. Johnson in the estate of Samuel M. Johnson under his will, he, nevertheless, did it as executor of her will, and compensation for these services, as others, rendered as executor was controlled, as a matter of law, by the provision of the will of Mrs. Louisa M. Johnson.

So, we hold that Mr. Jacobs, as executor, was entitled to neither of the credits involved in the litigation before us, and he will be disallowed credits for both.

The cause will be remanded to the County Court of Davidson County for a settlement and distribution of the estate in accordance with this opinion.

Appellant Jacobs will pay the costs of the appeal. In other words, this Court affirms the judgment of the Circuit Court in all respects except as to the allowance of credit of five hundred dollars to Mr. Jacobs.

• Street Railway v. Kohn.

MEMPHIS STREET RAILWAY CO. v. VICTOR KOHN.

Writ of certiorari denied by the Supreme Court, 1917.

1. STREET RAILWAY. *Injury by licensee. Burden of proof.*

It is incumbent upon a street railway sued for personal injuries received in a collision and defending upon the ground that the wrong was inflicted by a licensee to prove the contract of letting and to establish that the lease was permitted by law. In the absence of such showing plaintiff is entitled to judgment against the owning company for damages sustained at the hands of a third party using the track.

2. SAME. *Necessity of showing exclusive contract of facilities by licensee.*

In the absence of proof of a valid and permissible lease and delivering over of control of facilities to the licensee the injured party is entitled to judgment against the owning company under a declaration averring negligence of the latter. In such case plaintiff may treat the licensee as agent of the owning company.

3. SAME. *No variance. Nor where there is joint control.*

Neither in such case nor where joint control of facilities by lessor and lessee is there a variance such as will deprive plaintiff suing owner of the track of judgment under declaration averring negligence of the latter.

4. VARIANCE. *Party relying upon should specify in motion for new trial.*

Party relying upon a variance between pleadings and proof should point it out in his motion for a new trial.

FROM SHELBY COUNTY.

Appeal in error from the Circuit Court of Shelby County, Part Three. T. B. PITTMAN, Judge.

Street Railway v. Kohn.

McKINNEY BARTON, JR., for Plaintiff in Error.

BELL, TERRY & BELL for Defendant in Error.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

KOHN brought this action against the Memphis Street Railway Company to recover damages for the alleged loss of personal property and the sustaining of bodily injuries as the result of a collision between an electrically propelled car on the track of the Company and the vehicle of defendant in error. The case was tried by the Circuit Judge without the intervention of a jury. He pronounced judgment in favor of Kohn for \$300.00. The Company has appealed, and is urging one error, namely, that there is no material evidence to support the verdict and judgment of the Court.

The evidence is substantially to the effect that plaintiff below was run into by a gravel car moving upon the track of the plaintiff in error on Third Street in the city of Memphis. It seems to be virtually conceded that this collision was because of the negligence of the operators in failing to warn plaintiff or to give him an opportunity to move out of the way. Hence we shall assume that the case in so far as negligence is concerned was made out.

The specific contention of appellant here is that the instrumentality which did the harm belonged to the Memphis & Lakeview Traction Company, which was using the track of appellant at the time of the collision by some contractual arrangement between the two authorized by law and by the charters of the companies. It is urged that this was clearly demonstrated in the proof, and that as another consequence the plaintiff could not recover because of variance between the declaration and the evidence, the

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declaration averring that the wrongs were inflicted by plaintiff in error, whereas the proof showed that the car which ran upon Kohn belonged to the other company.

The evidence is substantially one way that the car which did collide with Kohn belonged to the Lakeview Company, and that it was in charge of the latter's servants, and was loaded with materials to be used upon the line of this Company.

The question presented is quite an interesting one, and we could use much space in discussing the authorities bearing upon the issue. But we are determined to confine our discussion as nearly as may be to the exact point arising, and will thus avoid some dissertations that may hereafter be embarrassing. This restricted treatment will likewise relieve us of elaborate examination or consideration of the many authorities adduced by able counsel for both sides. We remark, however, that we looked into all of the cited decisions to which we had access, and gave them close consideration; and this examination has been of very great service for the reason that the analysis suggested has given us what we deem to be the proper viewpoint from which to look at the question. In this connection we think it proper to state that some generalizations deducible from the authorities will help us materially in our solution of the problem advanced.

The exact question presented is whether a party who is injured while on the track of a public service corporation such as a street car company may sue the latter for those injuries and recover although it be shown that the immediate wrongdoer was another company who was using the track by a contract, the terms of which are not shown.

In the absence of an enabling statute no street railway company can put in charge a lessee or licensee and relieve itself of liability for the torts of the latter. This seems to

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be universally accepted as true. It was also a much disputed question at an earlier date as to whether the lessor would be relieved of liability in the absence of an express legislative direction that it be absolved, but it now is generally accepted, but not unanimously so, that in case of express authority to execute a lease whereby the lessee assumes full charge, the lessor is not liable for the wrongs of the lessee. We shall content ourselves with referring to the cases of *Arrow Smith v. Nashville*, 57 Federal, 165, and *Moorshead v. Railway Co.*, 96 S. W., 261. In the opinion in the latter case is a very discriminating review of practically all the authorities bearing upon the question, such a review as would make examination of preceding cases a work of supererogation.

There was no effort upon the part of plaintiff in error to show the existence of a lease in the instant case. The utmost that can be said of the evidence bearing upon this point is that there was in existence between the two companies some contract or arrangement whereby the Lakeview Company was merely allowed or given permission at the time of the injury to use the track of the company on Third Avenue. Hence the plaintiff in error cannot escape upon the ground that it had executed a lease.

The real contention of the Memphis Street Railway is that by virtue of Chapter 352 of the Acts of 1909, it was authorized to enter into any sort of an arrangement or contract whereby any other company could be given permission to use its tracks, and that as this power was exercised through legislative authority, there is an implied exemption from liability for the wrongs inflicted by a licensee. The Act in question is as follows: "*Be it enacted*, That street railroad companies and interurban railroad companies of this State operating their cars by electricity are hereby given power and authority to contract with each

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other for the use of the tracks of either by the other, both within and without the corporate limits of incorporated towns and cities, and such contracts shall be in writing, and may be upon such terms as the parties agree to, not inconsistent with law."

It may be said that under this statute street railway companies may by contract allow suburban companies to use their tracks, and it might be true that the former would not be liable for the negligent acts of the latter; but even this is debatable for the well-known reason that the public in the first instance have the right to look to the original chartering company for the misuse of its property and its franchises. It might require an express legislative exemption from liability in such case before the license-granting company can avoid responsibility. One of the very great reasons why the Courts have always been disinclined to the sanctioning of leases by railway companies is that they would be enabled thereby to grant their franchise to irresponsible and inaccessible parties. *Macon Railway v. Mays*, 15 American Rep., 678; see also note to 44 L. R. A., 741-746. But we are really not called upon to determine this exact point in the present litigation.

Every respectable decision which we examined expressly or by necessary implication ruled that when the original company sought exemption from liability for injuries occurring on its premises by virtue of a contractual arrangement with another, the burden was upon it to show the lease or arrangement which wrought this change, and also that it was in accordance with and authorized by the law. *Herron v. Railroad*, 68 Minnesota, 542; *Caruthers v. Railroad*, 44 L. R. A., 737, and notes. This certainly accords with the logic of the situation and with juristic principles. As before stated, any member of the public who sustains injury has the right to ascribe his wrongs to the owner of

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the track. If the latter seeks freedom from liability he must show such facts as will overturn this presumption.

By recurring to the statute under which plaintiff in error seeks justification it will be seen that companies are authorized to enter into contracts whereby there may be an interchange or use of tracks, that this contract must be in writing, and must be specific as to terms and conditions, and also that it must be such as is not inconsistent with established rules of law. It is plain that no presumption must be indulged with respect to such contracts, as they are in their very nature against common right and contrary to the generally accepted rules of law. Hence warrant in the lower Court for stating that the company had failed to disclose such a contract as would relieve it of liability. As observed, there is no effort to show that the contract was in writing, nor was a single provision of even an oral contract stated, and there was an entire failure to disclose any agreement between the two companies as to what portions of the track were to be used by the licensee, and at what time and in what method; and the whole thing is utterly silent as to the responsibility of the one or the other company for injuries that might be inflicted by the using company.

This exact point seems to have been decided in the cases of *Hollis v. Railroad Co.*, 44 Southern, 159, and *Sanders v. Railroad*, 225 Pa. St., 105.

The authorities are overwhelming that if a railway company undertakes to lease or farm out its road to another without legislative authority or in contravention of law, it will remain liable for every tort inflicted by the party or corporation which it lets into possession. *Arrow Smith v. Nashville Railway*, 57 Federal, 165; *Van Stugen v. Railroad*, 34 L. R. A., 577; *Rickets vs Railroad*, 7 L. R. A., 354.

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We feel constrained to treat the alleged arrangement mentioned in the instant case as not authorized or in accordance with the law, or as not shown at all. The consequence is that the wrongs of the plaintiff below must be ascribed to the appellant.

The most that can be said of the agreement between the parties is that it is some sort of arrangement whereby the licensee occasionally uses the track for its own purposes, and in a limited way. In the absence of an explicit showing the presumption must be indulged that the owning company retained and retains the control of its track and of its electricity at all times, and merely permits the other company to enter upon its roadway under the supervision of the superinendent or other guiding officers of the owning company. Hence the deduction must be that the operation is a joint one or else that the licensee is an agent of the owner. Responsibility attaches to the latter whether the one view or the other be taken. This is even in accordance with the case of *Railroad v. Carroll*, 6 Heiskel, 347, a decision which will be further reviewed later on.

There is practical unison among the authorities that a mere traffic arrangement whereby permission is occasionally extended to another to use the tracks of the owning company, especially where the latter does not relinquish entire control for the time being, both companies are liable for a tort committed by the user. *Nelson v. Railroad*, 62 Am. Dec., 614; *Quigley v. Railroad*, 38 Ann. Cases, 992; *Railway v. Parkes*, 106 C. C. A., 186; *Davis v. Railroad*, 41 S. E., 466; see also preceding cases cited.

Very able counsel for appellant contends that the questions involved have already been settled by the Courts of this State in the Carroll case just cited and in that of *Railroad v. Light*, 4 Higgins, 262.

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If we had a clearly established contract between the two companies in this record, that is, a contract explicit in its terms and reasonable in its provisions, and made by a responsible party, we might have some difficulty in reconciling the two decisions with the current of authority in this country and with our own intimations. But because of this absence of proof we are not called upon to make so nice a distinction between the cases as we otherwise might.

We shall nevertheless point out the difference existing between the two cases and that at the bar. In the Carroll case it was incontrovertibly shown that the engine that inflicted the injury was under the exclusive control of one railroad, although being operated upon the track of another. This fact of exclusiveness of control is of itself sufficient to differentiate the two cases. But another reason is found in the fact that Carroll was a servant of the railroad company upon whose track he was injured. But however that may be, the Court clearly indicated that if there was a joint arrangement, or if there was the absence of exclusiveness of management, then joint liability would result.

With respect to the Light case it may be said that the Court was dealing with a condition not absolutely imposed by law either upon the owner or licensee, while at the same time the plaintiff was seeking to hold the owner of the road liable upon a purely statutory cause of action. Again the evidence recited in that case warrants the deduction that the instrumentality which occasioned the injury was exclusively under the control of its manipulators. But however that may be, it might be well observed that the Light decision, following as it does the opinion of the Court in *Carroll v. Railroad*, is against the weight of authority in this country. In making that decision we felt constrained by the 6th Heiskel decision in passing upon the

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questions. But we think that neither adjudication stands in the way of the determination of the issues presented in this case.

It is next urged by able counsel that the suit ought to have been dismissed because of fatal variance between the allegations and the proof. The authorities seem to be uniform that a licensee or lessee who uses the track of a railway company without authority is to be treated as the agent of the owning company. 44 L. R. A., 737, and note. If so, there is no rule of logic or pleading which prohibits recovery under a declaration averring wrongs inflicted by the chartered company. But for another reason we do not believe that this variance should be treated as fatal. It was not specifically mentioned in the motion for a new trial, nor suggested in the motion for judgment non obstante. Hence the injustice of terminating the lawsuit against plaintiff below on this lack of correspondence of pleadings and proof. The judgment is affirmed with cost.

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ANDREW DRUFFENBROCH v. J. M. LAWRENCE.

Writ of certiorari denied by the Supreme Court, 1916.

MASTER AND SERVANT. *Former not liable for wilful acts of latter when. Barber shop employees.*

A master barber is not liable in damages to a customer who is stabbed or slashed by a hired barber when the latter is acting willfully and maliciously and not in pursuit of his master's business or orders.

FROM DAVIDSON COUNTY.

Appeal in error from the Circuit Court of Davidson County.

A. W. STOCKELL, JR., for Plaintiff in Error.

JOHN T. ALLEN and W. S. LAWRENCE for Defendant in Error.

SPECIAL JUSTICE R. H. SANSOM delivered the opinion of the Court.

THIS is an action brought against the master and servant seeking to hold both liable in damages for an assault committed by the servant upon the plaintiff in the absence of the master.

The declaration alleges that the plaintiff in error, defendant below, Andrew Druffenbroch, was at the time of the injuries alleged, the owner of a barber shop at 243 Fourth Avenue, Nashville, where he had in his employ a number of barbers and a superintendent of the shop; that

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he furnished the shop with chairs and other paraphernalia looking to the care of his customers at the hands of the barbers employed by him, and the performance of their duties usually incident to the patrons of a barber shop; that the duty of the plaintiff in error was to exercise a high degree of care in the selection of his employes, and to employ none except men of skill, ability, sobriety, politeness and industry so as to protect customers from indignities at their hands; that the plaintiff in error had employed Thornton B. Ladd who at the time was dissipated and in the habit of getting drunk and was fussy, troublesome and dangerous, and that these facts the plaintiff in error knew, or should and would have known, by the exercise of proper care; that in September, 1914, the plaintiff below went into the barber shop of the plaintiff in error, sat down in the chair operated by the employe Ladd, and that as he sat down in the chair he asked Ladd how he felt, and Ladd replied, using rough language, "I feel d— bad;" whereupon plaintiff below said, "If you feel that way I had better let someone else shave me," and moved into another chair and was shaved by another barber, the superintendent of the shop, in the absence of the plaintiff in error.

The declaration avers that this superintendent knew, or by the exercise of reasonable care could have known that Ladd was angry, and that the plaintiff below was in danger of being injured by him; that the superintendent was present and heard the conversation between Lawrence and Ladd and knew why Lawrence had left Ladd's chair; that after he, Lawrence, had been shaved and started to resume his coat, etc., preparatory to leaving the shop, Ladd approached him with a razor and inflicted numerous severe and dangerous cuts and wounds upon his body, and for the damages resultant therefrom he sued the assailant Ladd, and Druffenbroch, plaintiff in error.

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The second count of the declaration avers the disfigurement of the plaintiff's body and his sufferings, loss of time and damages incident thereto as another ground of recovery.

The damages are laid in the declaration at \$10,000.00, and a jury is demanded to try the case.

The declaration was demurred to, five grounds of demurrer being laid. It is not necessary to state them in detail, because the demurrer was overruled by the lower Court and no error is assigned in this Court upon the action of the trial judge in overruling same.

The defendant below, plaintiff in error Druffenbroch, then interposed a plea of not guilty. No statement of fact is deemed material in respect of the defendant below, Ladd, because he has prosecuted no appeal and assigned no errors in this Court touching the lower Court's action.

The case was heard before the judge and a jury, and after the introduction of the testimony, argument of counsel and charge of the Court, the jury returned a verdict of \$400.00 in favor of the plaintiff below, Lawrence, against the defendant below, Druffenbroch, and judgment was pronounced accordingly, motion for a new trial having been overruled.

It should have been stated that at the conclusion of the testimony the plaintiff in error moved the Court for peremptory instructions, which motion was overruled. After the verdict the plaintiff in error moved the Court for a new trial upon two grounds:

First. Upon the alleged error committed by the lower Court in his refusal to direct a verdict in favor of the defendant Druffenbroch at the conclusion of the testimony.

Second. Because there was no evidence, as stated, to support the verdict.

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This motion for a new trial was overruled, as stated, and from the final judgment pronounced this appeal is being prosecuted.

The facts as they appear in this record in so far as it is necessary to cite them are substantially; that the defendant Druffenbroch was a barber in Nashville, having a shop located on Fourth Avenue, wherein he employed some six or seven barbers. Among others employed by him was the defendant Thornton B. Ladd. The record shows Ladd to have been a good barber, and to have built himself up a fine patronage, so much so that he secured a per cent of profit above the ordinary union wage scale for his services by reason of either his superior workmanship or popularity, or possibly both. It appears from the record that a number of years prior to the time of the incident constituting the ground work of this lawsuit, and when Ladd as a young man moved from Williamson County, his then home, to Nashville, the defendant in error, Lawrence, was operating a barber shop and gave Ladd work in that shop, which was perhaps his first experience as workman in a barber shop, certainly one of his early experiences, if not his first. After Ladd had stayed in this shop and worked for the defendant Lawrence for some while, he made a change, and at the time of this change, according to Ladd's statement, the defendant in error, Lawrence, became displeased with him and some sharp words were indulged in. This statement by Ladd, however, is not corroborated by the defendant in error, Lawrence. It appears that during the period from that change up to the happening of the incident out of which this lawsuit grows, Ladd had worked in various shops in the city of Nashville and elsewhere, and during that period he had left the city perhaps more than once and had gone to other towns and cities and worked for a season. Lawrence, the defendant in error, had like-

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wise changed his occupation from that of a barber or the proprietor of a barber shop to a dealer in small articles incident to hair dressing and the appurtenances for a ladies' establishment.

It further appears that there was not a very warm degree of cordiality existing between these parties, at the same time no open rupture or difficulty seems to have ensued at any time. Lawrence, the defendant in error, was a patron to a degree of the shop of Druffenbroch, going into the shop with more or less frequency to be waited upon as a customer. It appears from the record that the defendant below, Ladd, drank whiskey and occasionally became intoxicated. The record does not disclose that this habit occurred to any degree of frequency, but it is apparent to the mind of the Court from the facts disclosed that at such times as he was under the influence of liquor he was not good natured, but disposed to be ugly in his temperament or disposition. The record fails to disclose as fact that he at any time since he had been in the employ of plaintiff in error, Druffenbroch, had been about the shop, or permitted or been allowed to wait upon customers of the shop when he was in an intoxicated state, or to any degree incapacitated for work.

The early part of September, 1914, defendant in error Lawrence went into the barber shop of plaintiff in error Druffenbroch and walked up to the chair of defendant Ladd who frequently shaved him and sat down in the chair, asking Ladd: "How do you feel this evening?" According to Ladd's statement, his reply was: "I am feeling badly." According to Lawrence's statement Ladd's reply was, "I am feeling bad and damn mean with it," and whereupon Lawrence said to him in substance, "I don't believe I care to have anyone shave me that is in that sort of condition and I'll just let somebody else shave me,"

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and arose from the chair and sat down in the chair of the superintendent or head barber of the shop in the absence of Druffenbroch, the plaintiff in error. It appears that this shop foreman shaved Lawrence, and while Lawrence was being shaved some other patron of the shop came in, sat down in Ladd's chair and was shaved or waited upon by Ladd. He finished his work before the foreman of the shop had completed the work of shaving Lawrence. When Lawrence arose from the chair after being shaved and perhaps had begun preparation for resuming his collar, coat, etc., Ladd spoke to him and invited him to come back to the rear of the shop; that he wanted to talk to him about something. They went back to the rear of the shop and stood in the entrance to or within the passageway between the bath tubs, a very narrow way, and just what passed between the parties while there is not entirely clear. The version of the occurrence by Ladd is one way, while the version of it by Lawrence is another, but in neither view was anything said or done that in anywise or to any degree had anything to do with the work of the shop or Ladd's discharge of his duties as an employe of Druffenbroch. The whole conversation in either view of the case involved merely matters personal and individual as between Ladd and Lawrence. As a result of their retirement to the rear of the room and momentary conversation, Lawrence was cut by Ladd, either with a knife or razor, from the left shoulder diagonally across the front, inflicting a wound extending a large part of the way diagonally across the body of Lawrence, causing the necessity of taking some twenty or thirty stitches, an ugly wound, but not necessarily a dangerous one.

Lawrence left the scene of the encounter and proceeded to the front door of the shop and Ladd followed, apparently with the intention of inflicting additional punishment, but

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others intervened and prevented any further assault. Ladd was arrested within a short while after that by the police authorities and placed in jail. This occurrence took place about the noon hour of the day. It was Saturday, as the record discloses, the day when patronage was brisk, and Druffenbroch, in order to wait upon his customers and at the request of someone, went upon Ladd's bond along with another, securing his release from jail, and put him to work in the shop where he remained, waiting upon customers as usual until perhaps eleven or twelve o'clock that night.

On Monday morning following, the brother of the defendant in error Lawrence approached Druffenbroch and suggested that he and his brother both being customers of the shop, they did not appreciate, but resented this continued employment by Druffenbroch of Ladd and his continuing upon his bond, whereupon plaintiff in error, Druffenbroch, surrendered Ladd and dispensed with his further services, taking his name off of Ladd's bond.

These are substantially the facts as developed in the record.

There are two assignments of error in this Court.

First: That the lower Court erred in his refusal to direct a verdict in favor of the plaintiff in error upon the completion of the hearing of all the testimony. Second: That there is no evidence to support the verdict.

The sole question of law involved under these assignments of error and statement of facts as given above, is, whether or not under this state of facts the plaintiff in error, Druffenbroch, as master, is liable to the defendant in error, Lawrence, for the assault upon Lawrence by Ladd, the servant, at the time and under the circumstances stated.

The lower Court thought that the master was liable, and declined to set aside the verdict after having declined to give peremptory instructions to the jury. We do not con-

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cur with the lower Court in his holdings. The view taken of this proposition of law by the lower Court was perhaps in accord with the English rule and the earlier authorities in Tennessee, but not, as we view it, in accord with the later rule as stated by the Supreme Court as follows:

“It is undoubtedly true, as a general proposition of law, that the doctrine of respondeat superior applies only when the relation of master and servant is shown to exist between the wrongdoer and the person sought to be charged with the injury resulting from the wrong at the time and in respect of the very transaction out of which the injury arose, and the mere fact that the driver of automobile was the defendants’s servant will not make the defendant liable. It must further shown that at the time of the accident the driver was on the master’s business, and acting within the scope of his employment. This rule was said by Blackstone to be founded on the superintendence and control which the master is supposed to exercise over his servant.” *Goodman v. Wilson*, 129 Tenn., 464.

And this same rule is adhered to and re-announced in 4th Thompson:

“We are referred to several prior cases decided by the Court which are assumed to be in conflict with the principles of the case just referred to. We are of the opinion they can be reconciled with this case, but, if not, must be considered as having been modified in so far as they may be in conflict with the said case of *Eichengreen v. Railroad*, *supra*. In this connection, the following observations by the New Jersey Court of errors and appeals are applicable:

“ ‘Under early English authorities, beginning with Lord Kenyon’s judgment in *McManus v. Crickett*, 1 East, 106, for such an act as that done by this defendant’s servant, the master was not liable. The early cases made the test

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of the master's liability depend upon the moral quality of the act instead of leaving it to depend upon the question of whether the act was done in the line of the master's business and within the scope of the servant's employment. This was not only true in England, but in this country. *Moore v. Stanborne*, 2 Mich., 519, 59 Am. Dec., 209; *Wright v. Wilcox*, 19 Wend. N. Y., 343, 32 Am. Dec., 507, note; *Cox v. Keahey*, 36 Ala., 340, 76 Am. Dec., 325; *Hughes v. New York & N. H. R. Co.*, 4 Jones & S., 222; *Yerger v. Warren*, 31 Pa., 319; *Pittsburg A. & M. Pass. R. Co. v. Donahue*, 70 Pa., 119; *Crocker v. New London W. & P. R. Co.*, 24 Conn., 249; *Brasher v. Kennedy*, 10 B. Mon. (Ky.), 30; *Hariss v. Mabry*, 23 N. C. (1 Ired. Law), 240. It will not be necessary to cite cases which show that this rule is no longer followed in England or this country. . . . The rule has been gradually extended until it may be said that the liability of the master for the willful, wrongful and malicious acts of the servant now extends to every case where the act of the servant is done with a view to the furtherance and discharge of his master's business and within the scope and limits of his employment. *Mott v. Consumers' Ice Co.*, 73 N. Y., 543; *Rounds v. Delaware L. & W. R. Co.*, 64 N. Y., 129, 21 Ann. Rep., 597; "O Am. & Eng. Enc. Law (2d Ed.), p. 169; *Holler v. Toss*, 68 N. J. Law, 324, 329, 53 Atl., 472, 474, 59 L. R. A., 943, 946, 96 Ann. St. Rep., 546, 550. And see 54 Am. St. Rep., note 72, 85, 86.

"In *Mott v. Consumers' Ice Co.*, *supra*, it is said: 'The rule recognized in all the recent cases, and which does not materially conflict with any of the older decisions, although it may qualify some of the intimations and casual expressions or illustrations of the judges, is that for the acts of the servant, within the general scope of his employment, while engaged in his master's business, and done with a

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view to the furtherance of that business and the master's interest, the master will be responsible, whether the act be done negligently, wantonly, or even willfully. In general terms, if the servant misconducts himself in the course of his employment, his acts are the acts of the master, who must answer for them.'

"But as held in these and other cases, if the servant goes outside of the scope of his employment, and, to serve some purpose of his own, does a wanton or malicious act to the injury of another, the master is not liable." *Terry v. Buford*, 131 Tenn., 4th Thompson, 467.

We might multiply authorities, both in Tennessee and other States, but for purposes of the present case those cited are altogether determinative. They are the latest announcements of the rule by the Supreme Court, and are controlling.

The result is that the assignments of error are sustained, and the judgment of the lower Court is set aside in so far as the plaintiff in error, Druffenbroch, is concerned, and the case is dismissed.

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BLOW STAVE CO. v. JOSEPH HATTENDORF ET AL.

INTERSTATE CARRIERS. *Agent. Misquotation of rates. Shipper cannot sue.*

A shipper can sue neither an interstate carrier nor an agent thereof for damages occasioned by misquotation of rates established by and on file with the Interstate Commerce Commission.

FROM SHELBY COUNTY.

Appealed from the Chancery Court of Shelby County,
Part II. FRANCIS FENTRESS, Chancellor.

MURRAY & ESSARY for Complainants.

CHAS. N. BURCH, H. D. MINOR and H. B. MCKAY for
Defendants.

MR. JUSTICE HIGGINS delivered the opinion of the
Court.

COMPLAINANT filed this bill against the Illinois Central Railway Company and defendant Hattendorf, General Agent of said Company, to recover as against the former the sum of \$353.71 and as against the latter the sum of \$261.80 for alleged overcharges and misstatements with respect of eight shipments of staves from Haleyville, Ala., to Decatur in said State via Cornith, Mississippi. The theory of the bill was that complainant had been misled with respect to the eight shipments by misquotations of rates, and that in particular this misquotation affected the

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cost or charges as to six shipments, thus entailing the losses enumerated. It was averred that the quotation was seven and one-half cents per hundred, whereas the interstate rate or at least that rate at which complainant was forced to settle at point of destination was fourteen and three-fourths cents.

While not very explicit, we are bound to render complainant's case and theory into the following (applying to complainant the ancient but very applicable rule that the presumption must be strongly against the pleader because of the uniqueness of the right of recovery presented): That is to say, there was on file with the Interstate Commerce Commission an established rate of fourteen and three-quarters cents, else complainant would never have been compelled to pay the difference; the rate must have been quoted by the agent as seven and one-half cents, and relied upon by complainant without any effort to ascertain from the commission or from other authorities the exact rate on file; and the prayer of the bill is that because of the misquotation and also because of the schedule fixed complainant suffered the damages claimed.

The defendants interposed a demurrer in which they contended that in no event could there be a recovery against either defendant for the reason that it would be against public policy and against the Act of Congress regulating interstate commerce; also because the rates were known to or available to the shipper; because there is no equity on the face of the bill, and also because the claim was asserted more than two years after the transaction out of which the demand grew. The Chancellor sustained this demurrer and dismissed the bill. From that part denying recovery against Hattendorf the complainant has appealed and assigned such errors as raise this question: Whether a shipper

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who has been misled by an agent of a carrier with respect to the established interstate rate may recover from the agent the damages which the shipper claims to have sustained by reason of erroneous quotations.

We, of course, must waive the apparently ethical side and be governed by the law. We have given this subject much thought, and have reached the conclusion that under no circumstances can a shipper consistently with the rules of law governing the subject matter maintain a suit of this nature. While this is a very interesting subject, and somewhat new, it does not demand elaborate treatment. We shall lay down briefly some propositions of law so well accepted as really to need no citation of authorities. For instance it is now the rule that when a rate is established and filed with the Interstate Commerce Commission it virtually has the force of a statute from which neither shipper nor carrier can in anywise depart, and knowledge of which is conclusively imputed to every shipper and every carrier. *L. & N. v. Maxwell*, 237 U. S., 94, 59 L. Ed., 853; *Coal Co. v. R. R. Co.*, 235 U. S., 371, 59 L. Ed., 275; *N. Y. R. R. v. York*, 102 N. E., 336; *Poor v. R. R. Co.*, 12 I. C. C., 418.

It is axiomatic that no man can recover upon the theory of fraud or mistake with respect to any matter of fact about which he has actual knowledge or legally imputed knowledge. *Early v. Williams*, 186 S. W., 105. The language of the decisions of the Supreme Court of the United States is such as to impute knowledge of rates to every shipper, and it seems that this imputation is of such cogency as to fix knowledge thereof upon the shipper, and further that the shipper is not allowed to stultify himself by asserting that he was not aware of the true rate. *L. & N. v. Hobbs*, 190 S. W., 461, referring to the Federal cases; *Railroad v. O'Conner*, 232 U. S., 510, 58 L. Ed.,

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503; *R. R. v. Robinson*, 233 U. S., 173, 58 L. Ed., 901; *R. R. Co. v. Coal Mining Co.*, 230 U. S., 189.

Again we are of opinion that under the public policy with reference to rates no recovery can be allowed a shipper for misquotation upon the part of an agent. It is established doctrine that no shipper will be permitted under any circumstances to obtain from the railway company any advantage over any other shipper of like class. No other conclusion can be drawn from the statute than that no arrangement and no species of litigation by means of which a shipper gets one cent more than other shippers in his situation will be tolerated. See cases cited and the further cases of *Armour Packing Co. v. The United States*, 209 U. S., 56, 52 L. Ed., 681. For instance, if complainant were allowed a recovery in this case either from the railway company or its agent, he would be put in a better position to the extent of his recovery than any other shipper who may have paid the stipulated rate. Hence a sustaining of this bill would create an exception to the Act and would bring about an advantage which is denounced by the law.

It is urged that the shipper acted innocently and ignorantly. Neither of these aspects has anything to do with the situation. Neither the utmost good faith of the carrier nor of the shipper will avail nor help the situation; nor can a shipper be heard to assert that he was ignorant of the established rate. *Railroad Co. v. United States*, 229 Fed., 509; *Railroad v. McFadden*, 232 Fed., 1000. It can readily be seen that the sustaining of this action would result in demoralization with reference to rates, and that it would particularly open the door to collusion between shippers and local freight agents. We are therefore convinced that public policy frowns severely upon such an action.

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Again, we are persuaded that a State Court has no jurisdiction of such a claim as complainant presents. It is undoubtedly a demand for reparation growing of an interstate shipment. This class of claims seem to have been given over entirely to the Federal bodies and courts. We thus construe the holding of our Supreme Court in the case of *Dayton Coal & Iron Co. v. Dayton Milling Co.*, 183 S. W., 739.

It results from the foregoing that the Chancellor reached the correct result; and it is accordingly ordered that his decrees be affirmed.

E. T. BANKS v. KENTUCKY LIVE STOCK INSURANCE CO.**1. BILL OF REVIEW. *Essentials. Must point out error or aver newly discovered evidence.***

A pleading purporting to be a bill of review cannot be sustained as such where it neither points out error apparent upon the record nor avers newly discovered evidence sufficient to show that an error of fact was committed in pronouncing the former decree.

2. CHANCERY PLEADING AND PRACTICE. *Accident or mistake not synonymous.*

An averment of accident or mistake as a ground of equitable relief against a judgment or decree is not supported by proof of negligence.

3. SAME. *General averments insufficient.*

General averments and conclusions as to accident or mistake will not suffice. Allegations must be of specific facts.

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4. APPEAL. *Dismissal without prejudice not permissible.*

A defendant against whom a money decree has been rendered and from which he has prayed and perfected an appeal may as of course dismiss his appeal, but this will not restore the *status quo* before the appeal.

FROM FRANKLIN COUNTY.

Appealed from the Chancery Court of Franklin County.
FOSS H. MERCER, Chancellor.

FLOYD ESTELL for Complainant.

GEO. E. BANKS for Defendant.

SPECIAL JUSTICE R. H. SANSOM delivered the opinion of the Court.

THIS case is before the Court primarily on a petition or bill of review, or bill of injunction, or petition for writ of error *coram nobis*, as it may be termed. The pleading is filed for the purpose of setting aside the final judgment pronounced by the Chancellor in favor of complainant Banks as against defendant company on the hearing of the case in the Court below. The petition was filed on January 5, 1916.

It avers that the petitioner, Kentucky Live Stock Insurance Company, is a corporation chartered under the laws of Kentucky, and that on the —— day of January, 1916, during the January term of the Franklin County Chancery Court a decree was pronounced against it in this cause in favor of the complainant Banks for \$600.00 with interest and costs. The petitioner is much aggrieved by reason of such decree, and because of the facts set out in

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the petition. It avers that in November, 1912, it sold certain stock to the defendant Banks by written contract, which is a part of the record, and refers to the original bill, answer and other proceedings in the cause, and makes them a part of the petition. The petition states the terms of the sale between complainant Banks and the petitioner in respect to said stock and the facts of the transaction and contract between parties and contention of the parties in respect thereof.

On the 23rd day of November, 1914, the petitioner filed an answer by and through its attorney, Judge Frank L. Lynch, and the contract between complainant Banks and the petitioner was filed as an exhibit to that answer. The petitioner avers that on April 10, 1915, E. T. Banks, J. E. Bratton and J. R. Elkins gave their depositions in this cause; that on May 1, 1915, the complainant Banks gave a second deposition in the cause and the deposition of his wife was likewise taken, all of said witnesses having been called by counsel in behalf of complainant Banks; that at the June term, 1915, of the Chancery Court the case was continued, and that at the January term, 1916, of the Chancery Court the case was "submitted" and the Court rendered judgment in favor of the complainant Banks and against petitioner.

It is averred that at the time this judgment was rendered the petitioner had a good and valid defense, but that no proof had been taken for it, and that E. T. Banks had not been cross examined by counsel for the petitioner, the right of examining him having been reserved at the taking of his first and second depositions. It is averred that if the petitioner had been afforded an opportunity to present its proof before the rendition of the judgment it could have proven that Banks was a wealthy man, and that he had made all his money as a trader; that at the time of

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purchasing petitioner's stock he was a shrewd business man; that he well knew the conditions of the contract he signed with the petitioner; that he knew when he signed it he was buying thirty shares of stock of the company for \$600.00, and that the contract was fully explained to him in the presence of reliable and responsible men before he signed it, and that he thoroughly understood it when he signed it; that no advantage was taken of him in any way, and that his bill and amended bill in the case were but a subterfuge to avoid complying with his agreements.

The petition avers that the chief office of the company is in Louisville, Kentucky; that when the bill was filed in the case it had no one in Franklin County employed to look after suits; that it employed Judge Frank L. Lynch, a member of the Winchester bar, to look after this suit; that they informed him of their defense to the cause, and that he filed an answer for the petitioner; that he informed petitioner that he had filed the answer and furnished the company a copy and agreed to take the necessary steps to protect the interest of the petitioner in the suit; that said Frank L. Lynch did not cross examine the witness E. T. Banks, and did not present any proof for the petitioner in the case; that the petitioner had no information of any kind from its attorney, Frank L. Lynch, as to the progress of the case after he forwarded a copy of the answer filed by him; that the first information petitioner had of any further steps having been taken was on February 14, 1916, when it received a letter from P. H. Williams, Clerk and Master of the Franklin County Chancery Court, dated February 14, 1916, in which he stated that the complainant Banks had obtained judgment against the petitioner for the sum of \$600.00, with interest and costs; that immediately upon receipt of this letter it sent a representative to Winchester to investigate the matter; that the Janu-

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ary term of the Court at Winchester having adjourned, it has since then collected the affidavits filed with the petition and has used them in the effort to be relieved of said judgment; that since the judgment rendered, the petitioner has been informed that Frank L. Lynch was a candidate for the office of Circuit Judge at the time complainant Banks took his proof in the case; that the said Frank L. Lynch was appointed judge in March of 1915, and assumed his judicial duties; that when he became judge he had no time to attend to the cases he had pending in different Courts; that he employed other solicitors to attend to some of his cases, but did not employ anyone to look after the case of petitioner, and when said case was submitted at the January term of the Court and judgment rendered, no one was present to represent petitioner, and no continuance was asked.

The petitioner avers that it had not presented any proof in the case for the reason that it was relying upon its solicitor, the Hon. Frank L. Lynch, to present its defense at the proper time, and that its officers are now, and were during the pendancy of the case, residents of Kentucky, and not Tennessee, but had a right to expect, and did expect, that their attorney, Frank L. Lynch, would give them notice when the proper time for taking of proof should arrive; that it had been ready at all times to interpose proof, and that its failure to do so was the result of its lack of information as to the progress of the case, which information it had a right to expect from its solicitor, Frank L. Lynch; that it had no information of any kind that the case would be submitted in January, 1916, and that the submission of the case at that time was a surprise to the petitioner, and prevented its making a proper defense.

The petition avers that Frank L. Lynch wrote the petitioner about the time he assumed his judicial duties and

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informed it of the status of the case, and advised it that his judicial duties would prevent his further activities in the matter, but that no letter was ever received by the petitioner from said Frank L. Lynch to that effect; that it received no such information in any other way; that it received no information from any source prior to the rendition of judgment against it that proof for the complainant Banks had been taken, or that it was time for the company to present its proof, or that the case could or would be docketed or submitted at the January term, 1916; that it had no information prior to the rendition of judgment against it that its attorney, Frank L. Lynch, had been appointed judge, and that if it had been advised of the appointment it would have immediately employed other counsel to look after the case.

It avers that the complainant Banks has no just claim against it for any amount; that the judgment is unjust, and "if such judgment is enforced a fraud on the just rights of your petitioner will have been effected through the instrumentality of the Court by E. T. Banks."

It avers that E. T. Banks knew the contents of the contract he had signed, and that no advantage was taken of him when he bought the stock. It further avers that there was a misunderstanding between the petitioner and its counsel at the time the judgment was rendered which is complained of, in that the petitioner understood that Judge Lynch was representing the company, when as a matter of fact he had ceased to act for the company, and had so advised the company in writing; that by accident or mistake no notice of the status of the proceedings was received by the company, after it was advised that its answer had been filed, prior to the rendition of the judgment; that by accident or mistake no notice of the cessation of activities of its

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attorney, Frank L. Lynch, was ever received by it prior to the rendition of the judgment.

It avers on information and belief that the letter was written by its attorney, and that by accident or mistake it did not reach its destination.

The prayer of the petition is that E. T. Banks be temporarily and permanently enjoined and restrained from collecting the judgment of \$600.00 with interest and cost obtained by him against the company in this cause; that the process of the Court issue against said E. T. Banks in this cause, and that he be required to answer this petition at the next term of the Franklin County Chancery Court, but his oath is waived; that on the hearing of this cause E. T. Banks be permanently enjoined from collecting the \$600.00 with interest and costs; that pending the final determination of the cause said E. T. Banks be restrained from collecting said judgment, and that at the final hearing said judgment be recalled, reversed and annulled, and that finally your petitioner have all such writs and other relief as may be necessary.

This petition is verified by the president of the petitioning company.

To this petition the defendant interposed the following demurrer:

1. The petition cannot be maintained as a bill of review, because it points out no error apparent on the face of the record, and there is no allegation of newly discovered evidence.

2. The petition cannot be maintained as a bill to set aside the decree for fraud, because there is no allegation that demurrant deprived the petitioner of any defense by any fraud or act of demurrant.

3. The petition cannot be maintained as bill to set aside the decree complained of on account of mistake or accident,

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because it appears from the face of the petition that the failure to take its proof and present its defense was an omission, neglect and default on the part of the petitioner and its solicitors of record. There is no allegation that the petitioner's solicitor ever mailed a notice to the petitioner that he could not represent it; on the contrary the petitioner submits as an exhibit an affidavit of the person in charge of its office that such notice was never received.

4. The record and proceedings show on their face that petitioner's solicitor continued to act as such after it is claimed that he wrote a letter that he could no longer do so, to-wit: On the 10th day of April, 1915, when depositions were taken and two of the witnesses cross examined by him; and on May 15, 1915, when depositions were taken in his presence, by consent; that the case was continued at his instance at the June term, 1915, and submitted by him at the January term, 1916.

WHEREFORE, Demurrant prays the judgment of the Court that the petition be dismissed.

This demurrer was heard by the Chancellor and sustained and the petition dismissed, and from that action of the Chancellor in sustaining the demurrer and dismissing this petition this appeal is being prosecuted and errors are assigned. The errors assigned and relied upon are four in number, and are as follows:

1. Because the petition on its face shows that there was a misunderstanding between the Kentucky Live Stock Insurance Company and its solicitor, Hon. Frank L. Lynch, and that due to said misunderstanding no proof was taken for said company, and it was not represented by counsel when the case was submitted at the January term, 1916, of the Franklin Chancery Court.

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2. Because the petition on its face shows that the Kentucky Live Stock Insurance Company was deprived of making a defense in the case of E. T. Banks against said company by accident and mistake and unavoidable casualty, and that the judgment rendered by the Franklin Chancery Court against said company would not have been rendered against it except for said accident and mistake and unavoidable casualty.

3. Because the petition on its face shows that the judgment rendered by the Franklin Chancery Court at the 1916 term, was not the result of negligence or carelessness of either the Kentucky Live Stock Insurance Company or its solicitor.

4. Because the petition on its face shows that the judgment rendered by the Franklin Chancery Court against the Kentucky Live Stock Insurance Company at the January term, 1916, of said Court is unjust; that E. T. Banks never had a valid claim against said company; and that if said company were allowed to introduce its proof, said judgment would have to be recalled, reversed and annuled.

In the opinion of the Court there can be no question of fact, but that unless the demurrer to this petition was erroneously sustained, then the judgment of the Court upon the merits of the case, the collection of which is sought to be enjoined, must be sustained because the proof is all one way that was before the Court at the time, and constituted the basis for the rendition of this judgment. So that the real question is whether or not there was error upon the part of the Chancellor in sustaining this demurrer.

The first ground of demurrer is that the petition cannot be sustained as a bill of review because it points out no error apparent on the face of the record, and there is no allegation of newly discovered evidence. An examination of the petition demonstrates that this ground of demurrer

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is well founded. The petition does not point out a single error apparent on the face of the record, nor is there any allegation of any evidence having been discovered since the rendition of the decree complained of. That being true, it does not come within the purview of a bill of review. The first ground of demurrer was properly sustained.

The third ground of demurrer directs itself to the insufficiency of the petition or that part thereof which seeks to set aside the decree complained of on account of mistake or accident. Clearly under the facts of this case, if there was any accident or mistake it was the accident or mistake of either the petitioner itself or of its attorney. There is no sort of averment in the petition at any place where any mistake or accident was brought about or in anywise contributed to by the defendant or his solicitors of record. It is true that the petition avers upon information and belief the writing of the letter by its attorney to it at such a time when, if such information had been received, the petitioner would have been afforded time, and ample time, to have prepared the defense now sought to be made, but the petitioner wholly fails to show that any such letter was ever mailed, and it wholly fails to produce any copy of said communication, and it wholly fails to introduce any affidavit from the associate counsel, A. J. Carrol, that he was not advised by Frank L. Lynch, joint attorney with him, of the facts in regard to the matter. So that the petition in that regard is manifestly insufficient, and the third ground of demurrer is sustained.

Going back to the second ground of demurrer, that of fraud. There is absolutely no fraud of any character averred in the petition on the part of the complainant Banks, or his attorneys of record, or any one connected with him, in bringing about or being conducive of the conditions existent, and as a result there is no error in the

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decree of the Chancellor in sustaining that ground of demurrer.

The fourth ground of demurrer is not altogether clear. Just who acted in the taking of these depositions the record does not disclose. It may be reasonably inferred, and the natural inference and the almost unavoidable conclusion to be reached from the record is that the petitioner was represented at the taking of these depositions by either one or the other or both of its counsel of record, not only in the taking of the proof, but in the continuance of the case in June, 1915, and in the "submission" of the case in January, 1916, when the decree complained of was pronounced by the Court, sustaining this demurrer. If there was any accident or mistake in the case, it was the accident or mistake of either the petitioner or of its counsel. While the averment is made that the results grew out of an unavoidable casualty, the facts stated do not warrant this averment. There was no unavoidable casualty as the Court sees it, as the casualty could have been avoided by the exercise of a reasonable degree of care or diligence upon the part of either the counsel for the petitioner.

A motion is made in this case, preliminary to the hearing of the case upon its merits, for permission to dismiss the appeal without prejudice, and to remand the case to the Chancery Court in Franklin County. This motion is overruled in so far as it seeks to dismiss the appeal without prejudice. The appellant may dismiss its appeal, if it so desires, but this will restore the judgment of the lower Court and the added security for the payment there of a judgment against appellant's surety on the appeal bond.

Affidavits are filed by counsel for appellant, J. S. McElroy, Jr., and George E. Banks, which accompany the motion for leave to dismiss the appeal, in which it is stated that they have just had their attention directed to the fact

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that A. J. Carrol appears as associate counsel of record in this case along with Frank L. Lynch. They say that the name of A. J. Carrol was put in the record by mistake, and leave is sought to correct the record so as to show that the name of A. J. Carrol should not have been attached as associate counsel with Frank L. Lynch, and to show that the said Carrol has never taken any steps in the case, and his name should not have been entered of record. The affidavit is wholly defective in that it fails to state that A. J. Carrol is not the counsel of the company. It does state that he has never taken any steps in this action, but he was one of the counsel of record for the company, and if he has never taken any steps for the preparation of its case and the protection of its interest, then there was perhaps negligence on his part as one of its representatives in his failure to do so.

Mr. Carrol does not make or attempt to make any statement in respect of or any explanation touching his connection with the company or the case.

In a supplemental brief filed by the appellant, or placed in the record by appellant and not marked "filed" a number of authorities are referred to.

The authorities cited and relied upon by appellant in the supplemental brief passed in with the record are not applicable to the facts of this case for the reason that they have reference alone to the question of Hon. Frank L. Lynch and his relation to the appellant company as counsel, leaving out altogether the fact that A. J. Carrol appears with him as joint counsel in the case for appellant. There is nothing in the record indicating even that Mr. Carrol was not as active in the conduct of the case as Judge Lynch except the affidavits accompanying the motion for dismissing the appeal without prejudice and these affidavits do not show that he is not general counsel for the com-

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pany, and they do not show any reason why he was not active in the case and its preparation.

There is nothing to show that Mr. Carrol did not know all about this entire proceeding from beginning to end. It should be stated in respect of the affidavits in support of the motion to dismiss the appeal without prejudice, that there is no averment in either of these affidavits that the petitioner did not know that the name of A. J. Carrol was attached to the answer filed by it in the case. On the contrary the petition states that Mr. Lynch furnished the company with a copy of the answer filed in the case at the time of its filing, so that the company necessarily knew that Mr. Carrol's name appeared as counsel in the case because it was signed as such to the answer.

There is no error in the record based upon which a reversal can be predicated and the assignments of error are overruled, and the decree of the Chancellor is affirmed.

Grader Co. v. National Bank.

RUSSELL GRADER MANUFACTURING CO. v. MERCANTILE
NATIONAL BANK.

Writ of certiorari denied by Supreme Court, 1917.

1. FOREIGN CORPORATIONS. *Doing business without registration of charter. May sue for tort.*

A foreign corporation doing business in this state without registration of its charter may, nevertheless, sue for torts to its property within the state.

2. CONVERSION. *Accepting and cashing of draft upon unauthorized endorsement of agent.*

The accepting and cashing of a draft payable to a principal upon the unauthorized endorsement of an agent is a conversion thereof and renders the cashing bank liable in trover to the payee and owner.

3. CASHING WARRANT UPON FORGED ENDORSEMENT. *Duty to give owner prompt notice.*

Upon discovery by a party that he has accepted and cashed a draft upon a forged endorsement, prompt notice should be given the owner.

4. SAME. *Consequences of delay to give owner notice. Necessity of showing loss as basis of an estoppel to deny demand of owner for the proceeds.*

It is incumbent upon the cashing bank seeking to repel the real owner's demand for the amount of the forged draft to show some financial loss attributable to the delay in giving notice of the forgery.

5. SAME. *But need not demonstrate specific loss.*

Requirements of the above rule are met by proof of the loss of probable opportunities of reimbursement which were lost

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to the cashing bank by reason of delay in disaffirming. And the rule is also met by proving *some* loss, even of an indefinite but substantial amount.

FROM SHELBY COUNTY.

Appealed from the Chancery Court of Shelby County,
Part I. F. H. HEISKELL, Chancellor.

WRIGHT, MILES, WARING & WALKER for Appellant.

T. B. TURLEY for Appellees.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

THIS bill was filed by complainant, a Minnesota corporation, against the defendant, a large bank of Memphis, to recover from the latter the proceeds of a Louisiana County warrant for the sum of \$850.00 drawn by the Jefferson Davis Parish of Louisiana and payable to the order of complainant and subsequently cashed by the defendant bank upon the order of an agent by the name of Ulrici. The theory of the bill was that the warrant was payable to the order of complainant only, and that the agent forged its name thereon, and thus wrongfully procured the proceeds, in which tort the bank participated.

The issues raised by the answer were that the agent of complainant had both express and implied authority to cash the check, that complainant had by long acquiescence ratified this wrongful act of its agent, had also estopped itself by this ratification to deny the authority of the agent, and had also misled the defendant by its failure to repudiate promptly the wrongful acts of its agents, and had

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otherwise prejudiced the defendant. It was also urged that complainant was a foreign corporation doing business in Tennessee without having complied with the laws as a condition precedent to this right.

The Chancellor granted a full recovery to complainant. From this decree the defendant has appealed and assigned numerous errors. The first one is that the Court was in error in not dismissing the bill for the reason that complainant had not complied with the statutes with respect to foreign corporations doing business in the State. It is admitted that complainant never filed its charter with the Secretary of State. But we are of opinion that this contention must be resolved against the defendant, for the reason that the right to recover presented by the bill is not in the nature of or connected with a domestic business transaction, but is for the purpose of protecting the property of the complainant which happened at the time to be in the State. The theory of the bill is that the defendant was guilty of a tort in accepting the draft upon which the name of the complainant was forged, this tort being a conversion or *quasi* trespass. This is a well-based proposition, and meets the contention that complainant should have shown compliance with the statute. The rule is universal that a foreign corporation even wrongfully in the State is entitled to the aid of the Courts in protecting its property. This proposition needs no other support than that of the *Louisville Property Co. v. Nashville*, 114 Tenn., 232. See also *Telephone Co. v. Pensauken*, 116 Fed., 9010; *Cattle Co. v. Custer Co.*, 91 Mont., 145.

As a matter of fact the transaction out of which this litigation grew, and those things leading up to it, were of an interstate nature, and thus not within the contemplation of the statute. The negotiable paper in question was issued in payment for a road grader sold to Louisiana parties by

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negotiations conducted by the agent of complainant. It is not material that the agent resided in Tennessee, and that complainant used a storehouse in which to consign its goods for southern shipments. The complainant at least had the right to sue in the Tennessee Courts upon every interstate transaction, although it may have in a manner established a business here.

That the conduct of the defendant amounted to a tort is established by the case of *Farmer v. Bank*, 100 Tenn., 190. We overrule the first assignment of error.

In the second assignment it is urged that the Chancellor should have found that the manufacturing company was negligent in failing to discover the forgery in question. This matter has given us much concern, but we believe after careful consideration of the facts, and of the rule established in this State and the intimations or holdings of foreign authorities, that the evidence does not establish this defense.

The facts are succinctly these: The draft or warrant was issued on the 4th day of March, 1915. It was the understanding that the document was to be issued about this time; and it is admitted that complainant expected the warrant to be transmitted at once to it. The warrant as a matter of fact was indorsed by Ulrici, the agent, about March 13th, and the proceeds paid to him on that date. Complainant made no effort until about April 24th to collect the account or to ascertain what had been done about it; and it was about June 3rd before anything definite was ascertained with respect to the account having been paid; and it was not until June 22nd that complainant found that the warrant had been cashed by the defendant bank. Some correspondence between complainant and the Parish Clerk occupied the intervening time up to May 24th. It was in response to this last matter that the Clerk informed

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complainant that the warrant had been drawn and had been cashed. The record discloses some delay in investigations. But the rule in this State is that a party defrauded or injured by a forgery is not required to act upon the assumption that a forgery has been committed. He can on the other hand assume that no such act has taken place. *Pollard v. Wellford*, 99 Tenn., 113. Hence we cannot say that complainant violated any duty when it failed to discover the forgery: *Water Company v. Bank*, 123 Tenn., 367; *White v. Bank*, 64 N. Y., 316, and other cases which need not be cited. But we desire to be understood as ruling that while the space of time occupied during investigations cannot be held as evidence of negligence in failing to discover the forgery, the suspicion indicated by the time and the circumstances must not be overlooked in passing upon the question now to be considered, namely, that of the negligence of complainant in failing to notify the defendant of the forgery after actual knowledge thereof had been brought home to complainant. This is the basis of the third assignment of error, in which it is urged by learned counsel for the defendant that complainant was guilty of negligence in not communicating with it with respect to the forgery, and that the Chancellor should have held complainant estopped to demand the proceeds.

We have given this question much consideration, and have reached the conclusion that this position is sound, and that complainant should be repelled. This is apparently in conflict with the great majority of the pronouncements of the Courts. But upon closer analysis it will be found to be in harmony with the basic reasoning of the adjudications. At all events the rule which we are going to suggest and follow accords in our judgment with the principles of equity and good conscience, as well as with the dictates of common sense and good business methods.

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It is said that our own cases establish the rule that mere delay without more furnishes the basis for an effective estoppel upon the party whose name has been forged. We have carefully analyzed these decisions, and do not believe that they touch the proposition, or if at all that that of *Pollard v. Wellford*, *supra*, is an intimation that the estoppel cannot be urged without showing the equitable feature of estoppel, namely, that of prejudice to the cashing bank. It is urged by learned counsel for appellant that a number of States hold that the showing of prejudice by delay is unnecessary in order to wage a successful defense against the payee whose name has been forged, and it is said that the United States Supreme Court took that position in *Bank v. Morgan*, 117 U. S., 92, 29 L. E. D., 811. It is pointed out in 3 Ruling Case Law, 539, that there are two rules, one to the effect that prejudice must be shown by delay, and the other that it is unnecessary to show harm or loss. We are of opinion that the better rule to be adopted would be this: To presume that prejudice resulted to the cashing bank by reason of negligent delay whenever it is shown that the latter would have taken some sort of steps to have protected itself had it been promptly informed of the forgery, and further that it is not incumbent upon the bank to show the exact amount of pecuniary loss sustained by delay when it is apparent that it did lose a right or an opportunity out of which it might reasonably have protected or indemnified itself. This is going to be our holding with respect to the case at bar. We would be more emphatic in our statement of the rule in such cases if we were the Court of last resort. We have nevertheless felt it not amiss to express what we deem to be the sound rule after much thought and extensive investigation. The authorities seem to be that prejudice must be shown, but that this prejudice may be easily proven or suggested. 3 Ruling

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Case Law, *supra*. See also 538. *Smith v. Fletcher*, 75 Minnesota, 189; 2 C. J., 511. We do not approve of the extreme position of the Supreme Court of Alabama taken in the case of *Bank v. Allen*, 27 L. R. A., 426, wherein it was held that the bank accepting the forged instrument must show to the very dollar the amount of its financial loss. We are more inclined to the doctrine of the Pennsylvania Court, and one or two others, to the effect that when the party whose name is forged has neglected beyond the proper time to give notice of repudiation, and where the bank has lost an opportunity to have the forger arrested or to appeal to his friends or to exert social pressure and also to use legal remedies even in a small way, there is thus furnished the predicate for an equitable estoppel. *McNeeley v. Bank*, 221 Pa., 588, 20 L. R. A., N. S., 79; *Marks v. Bank*, L. R. A. N. S., 1916E, 906; *Lynch v. Smith*, 25, Col., 103; *Reed v. Packing Co.*, 47 Ore., 215; *Brown v. Peoples Bank*, 40 L. R. A. N. S., 657. See also *Bank v. Morgan*, *supra*, wherein it was said that the opportunity to prosecute the wrongdoer, or to appeal to others to come to his assistance was sufficient for the basis of an estoppel against the party whose name was forged. We find in the case of *Cawser v. Paul*, 77 Am. Dec., 758, an early announcement of the rule that if because of the delay the cashing bank had lost its opportunity to proceed against the forger, an estoppel arose in its favor. It was also ruled in the case of *Bank v. Keene*, 53 Me., 103, that if the negligent conduct of the party in failing to give notice caused the bank to refrain from getting other security upon paper held by it the party would be estopped; and in *Wheeler v. Bank*, 107 S. W., 316, it was ruled that the failure of the party to repudiate an illegal transaction until after the wrongdoer had fled the realm was sufficient ground for an estoppel.

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We have carefully read the authorities called to our attention by able counsel for appellee bearing upon the question now under consideration. They are taken mainly from Massachusetts, a State which applies the rigid rule that the bank cashing a forged instrument must show specific financial loss. *A. Blum v. Reed Whipple et al*, 13 L. R. A. N. S., 211; also Meachem on Agency, Vol. 1, 2d Edition, page 269. The great difference is to be found in the application of the rule rather than in its statement; that is, the seeming difference is as to what may be considered a financial loss or resulting prejudice. According to the Massachusetts and Alabama view the cashing bank would have to show the actual number of dollars which it could have saved for itself if it had had knowledge of the forgery; while the other authorities are to the effect that if because of the delay opportunities were lost which may be reasonably assumed to have been of financial value, are sufficient upon which to predicate an equitable estoppel. Nor according to the later authorities need it be shown that a specific number of dollars might have been raised. The whole of the opportunities might be illusory, but yet a bank that has suffered because of a breach of moral and legal duty on the part of the party whose name has been forged should not be required to demonstrate his loss nor the exact extent thereof. It should suffice to show that some advantage, some valuable circumstance, could have been used to have bettered the position of the one whose funds had been taken away.

We have assumed all along that the defendant bank was innocent, or at least not grossly negligent to that extent which would deprive it of a right to reimbursement. It is true that the defendant acted wrongfully in cashing the warrant, but it is conclusively shown that its officers were innocent in the belief that Ulrici had authority. This

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belief was generated by a long course of dealing with Ulrici, and of Ulrici with complainant. The agent was a customer and depositor of the defendant, and had at different times large sums of money on deposit, and frequently cashed checks and warrants payable to different manufacturing and selling concerns, including complainant. The warrant in question was, of course, payable to the order of complainant alone, and could not be cashed except upon its order or by the act of an authorized agent; and we find that Ulrici did not have this authority, and could not therefore bind complainant. But we say that the circumstances were such as to make the acceptance of the warrant in question upon indorsement of Ulrici an act of perfect good faith upon the part of the bank.

The next question is as to whether the complainant was guilty of negligence in not communicating at an earlier period than it did the fact that the indorsement was without authority. Of this we have no doubt. According to every dictate of justice and fair dealing, and this is embodied in a well-formulated rule of law, complainant was under obligation, when it became convinced that its agent had assumed an authority not committed to him, and had caused the bank to pay out its funds, to notify the latter with reasonable promptness or within a reasonable time as the best authorities now hold (2 C. J., 519); and this reasonable time is dependent upon circumstances. We have no hesitancy in holding that the situation here raised a strong equitable compulsion to speak promptly. We find as a fact that there were reasons known to complainant as early as the 25th of May to believe that Ulrici had fraudulently disposed of the Louisiana draft. In fact, grounds of suspicion of this act were suggested by occurrences before the day named. For instance, it was shown that complainant was aware in the early part of May of the fact

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that Ulrici had committed forgery with respect to another warrant; and the great delay in connection with the paper here involved was such as would have put a prudent man upon active inquiry. But at all events complainant became aware by the 25th of June, if not the 22d, that this defendant had paid out to Ulrici the face value of the warrant in question upon the assumption that the indorsement of complainant's name thereon was by authority. And yet complainant delayed for thirty-five days at least the communication of even the least bit of information that the indorsement was a forgery. This, notwithstanding actual knowledge thereof by complainant's general agent, who came to Memphis, and also by its able attorney, who had represented it with respect to Ulrici's previous forgeries. It would have been an easy matter, a matter of thirty minutes, to have informed the defendant of the wrong that had been perpetrated upon it. The deduction of a manifest breach of complainant's duty is the only inference to be drawn from these circumstances. Notwithstanding the wrongs and conduct of Ulrici, he was retained by complainant as an agent until July 1st, when he was discharged. The record does not disclose whether complainant made any effort to indemnify itself upon this particular forgery from Ulrici. But there is a strong inference that it did. But it failed to say anything to the defendant bank for a period of thirty days after it had severed relations with Ulrici, knowing all the time that Ulrici was becoming more embarrassed financially, lowered in self-esteem, and losing in the number of friends.

The next question we shall determine is as to whether the situation justifies the inference of some prejudice or loss of right to the bank by reason of this delay. We repeat that in our judgment it was not incumbent on the defendant to demonstrate to mathematical certainty the fact

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of loss or the amount of the loss. It will suffice to show that it failed to take steps which might have reasonably been calculated to bring to it material results, or to have aided it in substantially retrieving its losses. We assert that this record discloses the loss of valuable opportunities. As we understand the authorities, at least those which meet with our approval, allegations of loss in general and without particularity of items will be sufficient to raise the question of fact, and that when this probability of material loss is shown, it is not for the Court to weigh the evidence nicely to ascertain the amount which could have been recovered. *Weinstein v. Bank*, 69 Texas, 38, 6 S. W., 171.

Ulrici was a depositor and customer of the defendant bank, having a little balance to his credit for several days after claimant could have with the greatest ease communicated the fact of forgery. Also reading the facts in the light of the usual, we infer that Ulrici was then a man of some financial standing and social pride. He had at least ingratiated himself into the respect and confidence of the officials of the bank. He remained in Memphis and accessible to all parties for some thirty days after complainant had full knowledge of his derelictions. It is impossible of course to determine what the defendant bank could have done within the time or under the indicated circumstances. We are of opinion that the chances were of value, and that they supply the requirements of the rule of prejudice required by the authorities. It certainly comes with bad grace from complainant to say that defendant's chances of reimbursement were without value.

One other circumstance not to be overlooked is that the officials of the defendant, acting as ordinary men, had grounds to believe that Ulrici had authority to deal with the paper of complainant. We have held that in strict law

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he did not have this authority, but we recite these circumstances for the purpose of enhancing upon the one side the equities of the defendant, and accentuating upon the other the duty of the complainant to have given notice of the forgery. There is a well-founded distinction between situations where an agent performs an unauthorized act and where the same is done by a stranger. In the former case the duty of repudiating is much more imperative. 2 O. J., 512; *Hart v. Dixon*, 5 Lea, 336. While we do not make this a controlling consideration in denying complainant a recovery, we are persuaded that it should not be overlooked in measuring the rights of the parties to this litigation.

We are of opinion that complainant should be repelled because of its negligence and breach of duty toward the defendant. It is therefore decreed that complainant's bill be dismissed at its cost.

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CITY OF NASHVILLE v. J. C. S. MASON.

Affirmed by Supreme Court, 1917.

1. VERDICT UPON CONFLICTING THEORIES OR INFERENCES AS TO CAUSE OF FIRE.

The finding of the jury upon conflicting theories that the origin of a fire was in a negligent act and not a stroke of lightning is conclusive as to the facts.

2. ACTION TO RECOVER VALUE OF INSURED PROPERTY DESTROYED BY FIRE.

It is no defense to an action by property owner against the wrongdoer for the destruction of a house by fire that the owner had been indemnified by an insurance company.

3. MUNICIPAL CORPORATIONS. *Liability for damages occasioned by the negligent management of a dump heap.*

A municipal corporation is liable in damages to an adjacent property owner for loss occasioned by a fire negligently communicated to the premises of such owner from a dump heap maintained by the city.

FROM DAVIDSON COUNTY.

Appeal in error from the Third Circuit Court of Davidson County. A. G. RUTHERFORD, Judge.

ALBERT G. EWING and F. M. GARARD for Plaintiff in Error.

LEWIS TILLMAN for Defendant in Error.

SPECIAL JUSTICE R. H. SANSOM delivered the opinion of the Court.

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THIS suit began in the Circuit Court for Davidson County by the Manufacturers, Merchants and Mechanics Fire Insurance Company and J. C. S. Mason against the City of Nashville for damages for the destruction of the home of the defendant Mason by fire; damages being alleged in the declaration at \$1,000.00.

The declaration avers that the defendant in error, J. C. S. Mason, owned a dwelling in which he resided at 1035 Vernon Avenue, in Nashville; that the City of Nashville, was at the time of the burning, using a vacant lot on Vernon Avenue, about 80 x 100 feet, northeast of the dwelling of the defendant in error, Mason, for dumping purposes, placing thereon heaps of old paper, rags, paper boxes, and other combustible matter, gathered up by the City Scavenger Department, and that the City of Nashville through its servants and agents, negligently, carelessly and recklessly dumped great loads of this character of combustible matter into and upon the large heap that was already burning on said dump heap near the dwelling house, and carelessly, negligently and recklessly left this burning heap at a time when the wind was blowing in the direction of and so as to, and did convey sparks and pieces of burning matter into and upon the house of defendant in error, thereby causing it to catch on fire and to be totally destroyed, together with its contents, and that in this way the defendant in error was damaged in the loss of his premises, and for which damages he sues and demanded a jury to try the case.

To this declaration the defendant below, plaintiff in error, the City of Nashville, interposed the plea of not guilty.

The case was heard on the 29th day of March, 1916, before Judge Rutherford and a jury, when a verdict was rendered and judgment pronounced in favor of J. C. S.

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Mason against the City of Nashville for \$400.00 and the costs of the case, and from that judgment this appeal is prosecuted, and ten errors have been assigned as follows:

- (1) There is no evidence to support the verdict.
- (2) The verdict is against the preponderance of the evidence.
- (3) The verdict is excessive.
- (4) The verdict is excessive and evinces passion, prejudice and caprice on the part of the jury.
- (5) The Court erred in not peremptorily instructing the jury to return a verdict for the defendant at the conclusion of all the proof.
- (6) The Court erred in charging: "The fact that the plaintiff did or did not have his house insured, or that he may have collected any part, or all of its value cannot be considered by you in arriving at your verdict in this case."
- (7) The Court erred in refusing to charge Request No. 1 of defendant, as follows: "I charge you, gentlemen of the jury, that the duty devolving upon the city of keeping the streets in a clean, healthful condition is a governmental function, and if you find that in doing so, a dumping ground is one of the essential features in connection with the discharge of this duty, then any negligence on the part of the city in maintaining such dumps cannot make the municipality liable in damages, and your verdict should be for the defendant."
- (8) The Court erred in refusing to charge Request No. 2 of defendant, as follows: "I further charge you, gentlemen of the jury, that if you believe it is the duty of the city to maintain a dumping ground for the removal from the streets and the private residences of its citizens, the accumulated filth and offal, for the purpose of maintaining the health of its inhabitants, and if in maintain-

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ing said dumping ground the same is kept in a negligent manner, yet the city under those conditions was performing a governmental duty and could not be held liable for such an offense, and your verdict should be for the defendant."

(9) The Court erred in refusing to charge Request No. 3 of defendant, as follows: "I charge you, gentlemen of the jury, that if you find that the city is removing offal and filth from the streets and private residences or property, said act of removing from private ownership resting originally on the individual property owners, but assumed by the municipality merely for the convenience and advantage of its citizens, such assumption of duty is wholly a governmental function, and if you find it is necessary in carrying out such governmental acts to maintain a public dumping ground, but which may have been maintained in a negligent manner, yet under these conditions your judgment should be in favor of the defendant."

(10) The Court erred in refusing to charge Request No. 4 of the defendant, as follows: "I charge you, gentlemen of the jury, that if you find from the evidence that private parties used the dumping ground in question for private purposes, and you find private parties dumped inflammable matter on this dump, thus accelerating the fire, that the City of Nashville would not be liable, and your verdict should be for the city.

The facts of the case, as we gather them from the record and stating them very briefly, are, that the plaintiff in error, through its constituted officers, servants and agents, had been for several years prior to the 3rd day of August, 1914, using and utilizing a vacant territory in the City of Nashville within its corporate limits located on the northeast corner of Vernon Avenue and a narrow alley way, the name of which is not material, as a waste heap and dump-

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ing ground for the city waste gathered from the streets, highways, alleys, etc., by the scavenger wagons and carried to this vacant spot for dumping purposes, it being a dumping heap.

It appears that the city not only utilized this as a dumping ground for the waste, garbage, etc., from the streets and city buildings and offices, but likewise suffered and permitted private individuals to utilize same as a dumping ground and waste place for such material and waste of all character as they might see proper to utilize it for.

On the 3rd day of August, 1914, the house and home of the plaintiff below, J. C. S. Mason, which was located on the southwest corner of the angle formed by Vernon Avenue with the narrow twelve-foot alley, the alley extending north and south and Vernon Avenue extending east and west, was destroyed by fire. The burning and destruction of this house took place in the late afternoon, the exact hour not being fixed, that is to say the witnesses all place the burning as occurring late in the afternoon, but differ as to the exact hour, which is not material. This dump heap located on the vacant lot in the northeast angle of Vernon Avenue and this alley way had been on fire and burning practically all that day and the occupants of nearby houses to that of the defendant in error Mason, some of them, had made effort to reach the fire department of the city and secure its attendance for the purpose of extinguishing the burning heap of rubbish on this dump. The blaze was along the south edge of the dump toward Vernon Avenue, and the wind was very high, somewhat in the nature of a storm blowing, as expressed by some of the witnesses, in every direction, but as shown by the proof to the satisfaction of the Court, the direction of the wind was from northeast to southwest and blowing directly from the burning dump to the house of the defendant in error.

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It appears that about the time this house caught on fire, as stated by one of the witnesses introduced by the city, there was a vivid flash of lightning, and that following the flash of lightning he saw a blaze start out from the rear or southern part of the defendant in error's house. A number of other witnesses examined in the case state definitely and positively that the wind blowing at the high rate of velocity it was, carried sparks and pieces of burning materials from the dump heap through the air toward and upon the house of the defendant in error, Mason. Both these theories were presented to the jury, the plaintiff below asserting that the fire was the result of sparks and burning pieces of matter being carried from the dump and dropping upon his house, the city insisting that it was the result of an act of God, the house being struck by lightning.

It appears that prior to the house catching on fire someone telephoned the fire department endeavoring to secure its attendance for the purpose of extinguishing the blaze on the dump; that the department had replied it could not come without specific instructions from the chief, and the chief had replied to the call and said that there would be no necessity for the department coming out because a heavy storm was impending, and the rain would be sufficient to extinguish the fire without the necessity of the fire department coming out.

It appears from the record, however, that the fire department did go out to the scene later on.

It is clear from the record that this dumping ground utilized as stated, by the city and by some of the citizens for the purpose indicated, had been a source of anxiety to the surrounding inhabitants, those owning homes nearby, for quite a while, perhaps for two or three years before this fire occurred. Some of the witnesses say that this dump had been on fire during practically the entire period, some-

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times smoldering and at other times breaking out in a blaze. It is apparent and uncontradicted in the record that on a number of occasions the city had sent its fire department, or a part thereof, to this dump for the purpose of extinguishing the blaze when the heap was burning. It is shown by the proof that on the occasion stated, the evening of August 3, 1914, under conditions above related, the house of the defendant in error, Mason, was partially destroyed, together with the contents, the destruction having been by fire, as stated. It may have been that a portion of the walls in the northeast corner on the north side thereof were not totally destroyed, but it was practically wrecked, as well as the contents, and because of the destruction of the premises in this way, the house and its contents, the defendant in error jointly with the insurance company brought this suit for damages for the destruction thereof. Afterwards the suit was dismissed as to the insurance company and its prosecution was continued by and on behalf of the defendant in error, Mason, the owner of the property, as stated above.

On the hearing, after argument of counsel, charge of the Court, the evidence having been concluded, the jury returned their verdict in favor of the defendant in error, and thereupon a motion for a new trial was entered based upon the same grounds and being practically a copy of the assignments of error relied upon in this Court as grounds of reversal.

For brevity's sake counsel for appellant has divided these assignments into groups, considering together one, two and five; three and four; six alone and seven, eight, nine and ten together.

Taking them up in that order, for the purpose of disposing of the questions submitted, and the errors assigned, we look to the first group, one, two and five, and they may

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be treated under the general head of whether or not there is any evidence to support the verdict and judgment of the lower Court. As gathered from this record, there were two theories advanced to the Court and jury as to the origin of the fire resulting in the destruction of the defendant in error's premises. The insistence of the plaintiff in error was and is in this Court that the only definite and positive evidence in the record in respect of the cause and origin of the fire is the swearing of a witness named Weeks, who says that he saw a vivid flash of lightning and immediately thereafter saw the rear end of the defendant in error's home burning. This witness could as easily have testified to the fact that he saw the lightning strike the house. As stated, the insistence of the plaintiff in error is that this is the only definite and positive testimony of any witness as to the origin of the fire. More than one of the witnesses for the plaintiff state that the wind was blowing a regular gale from northeast to southwest, directly from the burning dump heap toward the house that was destroyed, belonging to the defendant in error; that they saw sparks of fire as well as pieces or particles of burning materials carried through the air, which fell upon the premises destroyed and burned. The swearing of the witnesses as to the facts going to establish each and both of these theories is just as positive practically in one instance as in the other, but certainly there are more of the witnesses swearing to the carrying of sparks and burning particles by the wind from the burning heap to the house, and this being true, there is unquestionably evidence upon which to base the verdict and judgment, and this Court is not prepared to say but that the preponderance and weight of the testimony is in favor of that view. At any rate, there being ample evidence to support it, under the well-settled rule in Tennessee, the jury having passed upon

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that question after a proper charge, this Court is precluded from disturbing the verdict upon that ground. So that these three assignments of error are overruled, the first, second and fifth.

The next group of assignments, three and four, go to the question of the excessiveness of the verdict and the assertion that it is so excessive as to evince passion, caprice and prejudice on the part of the jury. Without going into detail of this matter, we think it sufficient to say that we have examined the record specifically in respect of this subject and this phase of the case and these assignments of error are not well founded. There is a difference in the view of the witnesses examined touching this question of the expense that would follow or accrue in the re-habilitation of the premises, the plaintiff, however, gives a statement of the matter which seems altogether reasonable and from that statement his loss is about \$425, the jury gave him only \$400, and we are unable to see any evidence of the fact that the verdict was excessive to the extent that there was any caprice, passion or prejudice underlying the action of the jury.

The next assignment of error is No. 6, going to the alleged error in the Court's charge to the effect "that the fact the plaintiff did or did not have his house insured or that he might have collected any part, or all of its value cannot be considered by you in arriving at your verdict in this case." The insistence under this assignment is that the suit cannot be maintained in the name of the plaintiff, the owner, he having been paid his loss by the insurance company in which he had a policy of insurance, but that the suit must have been prosecuted either in the joint name of the defendant in error Mason and the insurance company, or in Mason's name for the use and benefit of the insurance company. In other words, that

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the insurance company must be the beneficial plaintiff in order to a recovery. This direct question has been definitely passed upon in an opinion delivered by Mr. Justice Wilkes for our Supreme Court, in which it is said:

“In regard to the proper parties to the action, we do not think the assignment well taken. If it be conceded that the insurance company, having paid the entire fire loss, is not entitled to be subrogated to the rights of the insured as against the tortfeasor, or to recover back from the amount he recovers, still it does not prevent a recovery in the name of the insured for the damage sustained. The question of who will be entitled to the proceeds of the recovery, the insurer or the insured, is a matter between them, and constituted no defense to an action for damages caused by the wrong which, in any event, must be brought in the name of the owner and insured, although it might be for the use and benefit of the insured. Am. & Enc. L., Vol. 24, pp. 308, 309, 310; *Perrott v. Shearer*, 17 Mich., 48, 55, 56; *Clark v. Wilson*, 103 Mass., 219, 227; *Haywood v. Cain*, 105 Mass., 213; *Webber v. Morris & Esses R. R. Co.*, 13 Met., 99; *Concord M. Fire Ins. Co. v. Woodbury*, 45 Me., 453; *Carpenter v. Provident Ins. Co.*, 16 Pet., 501; *Insurance Co. v. Updegraff*, 21 Pa., 518; *Kernochan v. N. Y. Fire Ins. Co.*, 17 N. Y., 428; 51 Ill., 410; 52 Ill., 442.” *Anderson v. Miller*, 96 Tenn., 12 Pickle, 36.

So that this assignment of error, number six, is overruled.

Assignments of error Nos. 7, 8, 9 and 10 go to the question of the alleged mistake by the lower Court in his refusal to give in charge certain special requests stated by the plaintiff in error, in and by the terms of which the Court was asked practically to charge the jury touching

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this question of this dump heap, that if the jury should find that the city had maintained it that then and in such event it maintained it purely in its governmental capacity and therefore the city would not be liable for any damages resulting therefrom.

The attention of the Court has not been directed to any case in Tennessee that has fixed the rule definitely. It has been held that the duty of the city in the extinguishment of fires is a public duty and not a corporate one, and that an action for damages could not be maintained against the city because of any negligence of the fire department not responding to the call for service in the extinguishment of burning buildings. *Irving v. Chattanooga*, 101 Tenn., 271.

It has also been held that municipal corporations are not bound to build sewers, but the question of building or not building sewers, even for the purpose of taking care of a nuisance, the nuisance itself having been the result of lack of sufficient or proper sewer connections, but that the performance of that function addressed itself to the sound discretion of the municipal authorities. *Chattanooga v. Reid*, 19 Pickle, 616.

At the same time it is held in this State that no municipality has a right to maintain a nuisance. Where it *undertakes* to do a public work it is not permitted to do that work in such way as to create a nuisance; that while it is not bound to do the work in the first place, it cannot be compelled to construct the improvement, but if it does construct or begin the construction of the improvement, then the work of construction must be done in such way as not to create a nuisance and thus infringe upon the individual right of its citizens. In other words, the effect of this holding as the Court interprets it, is, that it is liable, as anybody else or any other corporate body or

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individual, for damages where it creates a nuisance in its construction work. 17 Pickle, 342.

While a municipality is not bound to build a sewer, and the necessity therefor is to be determined in the exercise of its legislative function, yet it is not privileged to commit a nuisance, and if a sewer is constructed under legislative discretion and the municipal authorities permit it to be so *negligently constructed or operated*, they will be liable in a private action to the party injured. *Mayor, Etc., of Knoxville v. Classing*, 3rd Cates, 134.

The fourth headnote of that case is as follows:

“The proof showed that the city authorities had directed garbage to be deposited in a sewer near plaintiff’s residence, and that this created a nuisance causing the sickness and depreciation of the property complained of. Upon these facts the trial judge was requested to charge, in substance, that the operation of the sewer by the city was a governmental or legislative function for which it was not liable in a private action. (*Post*, pp. 136-139.)

“*Held*: The refusal to charge as requested was not error because the facts make a case of liability against the city, even if the construction or providing of the sewer be held to be a legislative or governmental function.”

This case of the *Mayor, Etc., of Knoxville v. Classing* is an instructive one along the line of the question involved in the instant case. It seems to be the concurrent view of authorities generally that the municipality in operating a public work is not privileged to commit a nuisance to the injury or damage of any of its citizens, and if it does commit a nuisance in the carrying forward of a public improvement of any character determined upon, then it must be responsible for damages to the private individual or whomsoever is damaged by reason of

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the nuisance thus created, permitted or committed. In other words, the *privilege* is the exercise of a governmental discretion in respect of whether or not a work or improvement is to be begun or prosecuted, but that matter having been decided and the work begun, then it must be prosecuted in a way to avoid the commission of any nuisance, and the municipality is liable for the nuisance committed in the execution of the plan determined upon in the exercise of its governmental function.

The insistence seems to be in the instant case that it was not any part of the city's duty to remove debris from the streets and private residences, but that this duty is primarily upon the citizenship and not upon the municipality. That question is not material for consideration in this instance because if the city did undertake in this case to remove dirt, or trash from the streets and the premises of private individuals and dump it upon this waste heap that was burning, then it undertook and performed the work voluntarily, if it was not bound to do it, and it was compelled, after undertaking it, to do it in such way as not to commit a nuisance or to injure private individuals in the execution of the work. The same principle would apply to that as would apply to the building of sewers. It does not have to lay pavements; it does not have to remove dirt, trash and debris from the premises of private individuals. The question of whether it *will* or *won't* do any of these things is a question for it to solve in its governmental capacity, but having solved it and begun the work, it must prosecute it with care so as to avoid a nuisance or injury to the rights and properties of private individuals.

The case of *Denver v. Davis*, reported in the 11th Vol. Amer. & Eng. Cases Annotated, at page 187, cited by counsel for appellee, seems to more nearly fit the case in

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hand than any other authority cited, or that we have found, and is quite an instructive dissertation upon the subject in hand, and refers to many authorities touching the question.

In our judgment, applying the rule of law announced to the facts of this case, it seems that the city was not compelled, in the exercise of its governmental function and powers, to have established this dump heap at all. It was not compelled in the exercise of its governmental powers either to take trash, debris, etc., of any character from the homes of private individuals and carry it to this dumping ground, or to permit individuals to place the waste materials taken from their homes and places of business upon this dumping ground, but its election to establish this dumping ground terminated the exercise of its legislative function, and the maintenance and method of caring for this dumping ground or permitting it to be used, was not within the governmental functions of the city, and for any negligence in respect of such management it was liable for damages to individuals suffering such damages by reason thereof.

This being the view and judgment of the Court below, it follows that the assignments of error, 7, 8, 9 and 10, are not well founded and are overruled.

The result is that there is no error in the verdict and judgment of the lower Court and the case is affirmed with costs.

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L. & N. RAILROAD CO. v. OLIVER JOHNSON.

Writ of certiorari denied by Supreme Court, 1917.

1. **RAILROADS. Statutory precautions. Whether person an obstruction question for jury when.**

Where there are two conflicting theories as to whether a person killed by a moving train upon a railway track was an obstruction, with evidence tending to support both, the verdict of the jury is conclusive upon review.

2. **SAME.**

Cognate questions, such as whether the person could or should have been seen by an alert lookout in time, and whether the engineer took proper and timely precautions, are likewise for the jury upon conflicting evidence.

3. **SAME. Practice. Introduction of evidence in rebuttal of defense of railroad.**

Plaintiff may in rebuttal of the defense of statutory observance urged by a railway company offer any competent evidence tending to show either that the company did not obey the precaution statutes or that its excuses for non-observance were unfounded.

4. **EVIDENCE. Tests and experiments. Similarity of circumstances. Instructions.**

Evidence of experiments or tests is always of value when they are properly conducted and approximate the original circumstances. The finding by the trial judge of similarity is entitled to great weight. And when in case of dispute the court instructs the jury to disregard the experiments if they are not similar, the error of slight dissimilarity will be cured or treated as immaterial.

5. **SAME. Tests from points more unfavorable than railroad urges. Maxim that greater includes the less applied.**

It is competent for plaintiff in action against a railway for wrongfully killing another to introduce evidence of the dis-

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tance at which the person could have been seen by the engineer or fireman from a given point, and the fact that the observers in the experiment were upon the track instead of an engine does not render evidence of the test inadmissible.

6. PRACTICE. *Instructions. Court misstating contentions. Duty of counsel.*

It is the duty of counsel to pay strict attention to the trial judge's statement of theories and to have all errors of *fact* or contentions of fact corrected; and counsel should, if he discovers that the court is too limited in his statement of theories, call attention thereto by special requests.

7. SAME. *Instructions considered as a whole. Doubtful and partial statements cured or aided by other instructions.*

The charge of the court, including special requests given, must be taken as a whole. Doubtful and partial instructions may be found to have been aided and cured by other instructions. It is sometimes impossible, at other times improper, to embrace the whole of a theory or a proposition in one sentence, paragraph or part of a charge.

8. SAME. *Presumption that jury understood the language of instructions and that they applied general statements to immediate occasion.*

Courts must presume that jurors understand the charges given them, and that the court in using general statements had reference to the case immediately in hand.

9. DAMAGES. *For mental suffering. No instructions upon when.*

Where the evidence is all to the effect that deceased died instantly, the court upon request should tell the jury not to award any recovery for mental and physical pain.

10. SAME. *Contributory negligence in statutory precautions case. Proper to call attention of jury to fact of deceased's drunken condition.*

It is proper in such case to direct the attention of the jury upon special request to the consequence of deceased having been drunk or asleep upon the track, that is, that such if shown by the evidence, should be weighed by the jury in seeking grounds for mitigating damages.

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11. SAME. *Remittitur as curing errors.*

Errors committed by the court solely bearing upon the amount of the recovery may often be cured by suggesting a remittitur.

FROM HAYWOOD COUNTY.

Appeal in error from the Circuit Court of Haywood County. T. E. HARWOOD, Judge.

J. W. E. MOORE & SON for Plaintiff in Error.

BOND & BOND for Defendant in Error.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

DEFENDANT IN ERROR is the administrator of one B. F. Johnson, colored. As such representative he instituted this suit against the railway company for the alleged wrongful killing of his intestate. The case was tried by the Court and a jury, and resulted in a verdict and judgment of \$1,200. The company has appealed and assigned numerous errors.

This was tried in the lower Court as a statutory case. There arose upon conflicting evidence two theories with respect to the manner in which Johnson met his death. It was urged by the railway company that he was lying drunk or asleep by the side of the track, with his head so near the rail as that he was not visible except at close range; and especially that the deceased could not have been seen because of his prone position from some 200 feet or more from the crest of a grade of the railway track a mile or two north of the town of Gadsden. It was contended upon the other hand that the deceased was either

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walking or standing upon the track and was run into from the rear and thrown some distance and fatally injured.

Where conflicting theories arise with evidence tending to support either, it is our duty to give assent to that version accepted by the jury. Assuming for the time being that the insistence of the railway company, if clearly shown, would have been conclusive of the case in its favor, and upon the other hand that the contention of defendant in error, if sustained, made out a case of liability, we can dispose of the first three assignments of error easily. These assignments are to the effect that there is no evidence to support the verdict, no evidence justifying submission of the case to the jury, and that the Court should have given peremptory instructions either at the conclusion of plaintiff's evidence or at the close of all the proof.

In fact, there is much evidence tending to support the theory of the defendant in error that Johnson was not lying upon the track and in the position urged by the railway company, but that he was walking or standing upon the track. It was shown that there were brains and blood between the rails of the track and also that the body was knocked up in the air and quite a distance away. This would not have occurred had Johnson been lying flat upon the ground and upon the outside of the rails.

Another conflict of contention is found with respect to whether Johnson appeared as an obstruction upon the track at the time he was injured. It is apparent that these diverse insinuations are correlated with those as to the position of the deceased upon the track. If Johnson was walking or standing, it is probable that he could have been seen at a distance such as would constitute him in the law an obstruction. If he had been lying, as urged by the railroad, the issue as to whether he appeared as an

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obstruction and also as to whether the railway did all in its power to prevent an accident after he was seen, were issues that were sharply drawn. But we do not believe that the case can be brought into so narrow a compass, for the reason that the jury evidently thought that Johnson was standing or walking on the track, as this was the most favorable view which can be taken of the evidence. So that we are forced to the position that plaintiff in error cannot assail the verdict for lack of evidence to support the finding that Johnson did appear as an obstruction and that the railway company failed to observe the statutory precautions.

Another dispute arising from the evidence was as to whether the engineer sounded the alarm whistle and also at what stage he put down the brakes and made his efforts to stop the train. There was evidence to the effect that these precautions were not taken until about the time or after collision with the body of Johnson. The jury were warranted in so believing; at least it was their province to give credence to the testimony; and in such case we are again unable to say there is no material evidence supporting the verdict. This was for the jury to determine from these diversely given circumstances.

An additional aspect remains to be mentioned. It was urged by the railway company that Johnson was some 200 feet beyond the point of the rise, and that he could not be seen until the summit had been reached, and that when he was observed the railway servants instantly put into execution every available precaution and means to stop the train. There was introduced in rebuttal some evidence to the effect that notwithstanding this ascent and notwithstanding the point at which the collision took place, Johnson could have been seen as an obstruction, whether standing, sitting or lying, some 500 yards down the track

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toward which the train was coming. This again was a matter of credibility of witnesses and within the functions of the jury.

It results from the foregoing review that these three assignments of error must be overruled. This is not the case of inherently unbelievable testimony, but rather whether the one or the other of the opposing witnesses should be accepted as having told the truth.

In assignment No. 4 it is complained that the Court in rebuttal allowed plaintiff below to introduce witnesses who testified that they went upon the scene of the killing and applied certain experiments to the situation with the view of determining whether the theory of the railway as to inability to distinguish a person lying on the tracks was sound.

It is urged in the first place that this was a matter in chief. This contention is at variance with the practice observed in railroad cases. Plaintiff below had the right to show in rebuttal that the excuses offered by the railway company as its reasons for not observing the statutory precautions were baseless or untrue. Holding's Railroad Law, 571. Plaintiff is required, in the first instance, to show only the killing by a moving train while the person is on the train in front.

It is also urged that this was evidence of experiments made under circumstances that were not at all similar to the tragedy which they were supposed to re-enact. The specific contention is that the person used on the track to represent Johnson was not at the point nor in the position occupied by the latter; and, further, that the observing parties were on the track and not upon engine, as were the engineer and fireman.

It was established by the preponderance of the evidence that the party to be observed in the experiments was at

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the point at which Johnson was killed. The jury so believed, as did the learned Circuit Judge. This would suffice for us, for the finding by the Court of similarity is entitled to great weight. But however that may be, the Court instructed the jury that if they discovered that the experiments were not with respect to the position of Johnson substantially as the facts were, then they should disregard the evidence of these tests entirely. We are of opinion that this cures any supposed error.

With respect to the fact that the observers were not in the position occupied by the engineer and fireman it suffices to say that the latter were in an infinitely better place and did or could have seen much more, legalistically speaking, than did those upon the engine. We have here an illustration of the very wise maxim that the greater always includes the less. This may always be resorted to in a reasoning process. If those upon the ground some 500 yards back could see the body of a person on the track at the point of collision, then *a fortiori* a person on an engine could behold the same objects much more distinctly than could the party on the ground.

We see no reason for pronouncing the experiments so far removed from the facts as to be objectionable. Tests are invaluable in the ascertainment of the truth with respect to distance, etc., and they should be liberally admitted and used in the practical administration of justice in all cases where they will aid in developing the facts. We overrule this assignment of error.

The basis of assignment No. 5 is the following instruction to the jury: "The defendant not only insists that the intestate did not appear upon the track or in striking distance of the train and was not struck by the front end of the engine and train, but that if he did so appear and was struck and killed as plaintiff claims, it would not be

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liable under the law applicable to the operation of trains and of persons upon the track.”

It is urged that this was a misstatement of the railway's theory, the latter being that Johnson was drunk or asleep upon the track, and in such position as not to be visible until the train reached the summit, when everything possible was done to prevent collision.

Our first observation is that it was incumbent upon learned counsel to listen closely, and if he conceived that the Court was misstating his contentions, to call the attention of the Court to the error and have him to correct himself. *Hosiery Co. v. Napper*, 124 Tenn., 155. In the next place we apprehend that able counsel failed to ascribe to the language of the Circuit Judge that meaning which the latter evidently intended, namely, that the word “appear” indicated that the object was to be *seen* as an obstruction. Again, if plaintiff in error desired an elaboration of its defenses, it should have, as in fact later was done, requested the Court for more explicit statements. We do not see that there is any material error of which appellant can complain.

In assignment No. 6 complaint is made of the following instruction: “Railroad companies are generally liable for all damages resulting from a collision with the front end of an engine or train of cars if it fails to observe these precautions, unless the person appears on the track in front of the moving engine so suddenly that the lookout ahead cannot see it because of its close proximity or so close to it that the engineer cannot stop the train in time to prevent the injury, under which circumstances the railroad company would not be liable.”

The first clause is vehemently criticized and urged to have been prejudicial. We are of opinion that this statement is ordinarily true. For railroads are generally liable

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for collisions with its moving trains away from station grounds. It is also complained that the Court again injected into the issue a question of sudden appearance or coming upon the track, when the contention of the railway was that Johnson had been for some time lying upon the track and was seen only a moment before the collision. The sudden appearance feature, when the whole charge is taken into consideration, was presented to the jury in such way as that they understood that appearance meant the time and place at which the body could have been or was seen, and there is nothing in the language which denied plaintiff in error the benefit of this latter theory. It must be remembered that there was testimony to the effect that a short while before this collision Johnson was seen at a tie stack by the side of the road. If so, he, of course, walked at some time *toward* the track; and it cannot be said that all the circumstances supported the sudden appearance of the negro upon the track. It must also be remembered that the judge was dealing with matters in general and was not undertaking at this point to state specifically the contention of the parties. Hence, this language might be treated as an abstraction or generality. But however that may be we do not think that the railway company was prejudiced thereby in view of other instructions. Charges must be considered as a whole. It is sometimes impossible, at other times improper, to embrace the whole of a theory or proposition in one sentence, paragraph or part.

In assignment No. 7 it is urged that the Court committed error in the following instruction: "If you find from the proof that the intestate was killed and injured by being struck by the front end of the moving engine on the defendant's track and the railway company failed to show that it had the engineer or fireman or some other

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person on the lookout ahead and failed to observe all the precautions under the instructions given you, then the plaintiff will be entitled to some damages.”

The Court intended to and did say by this language that if Johnson was killed by a collision with the front end of a moving train and the company failed to show that it had the engineer or fireman or some other person on the lookout and failed to observe all precautions, then the plaintiff will be entitled to some damages. This proposition is generally true, and hence the instruction cannot be said upon its face to be erroneous. Again, it cannot be said that the jury, in view of other instructions, understood that the railroad was liable in some damages just because Johnson was at some period of time on the track ahead, however shortly before the collision. For the jury were told distinctly in another place that if, because of the grade and position of the body, the railway company did not have time to observe the precautions it would not be liable. So that while the instruction, standing alone, is dubious, this lack of certainty disappears when it is considered in connection with other parts of the charge.

It must be remembered that railroads are liable unless they show excuses for non-observance, and that Courts may instruct juries to this effect, leaving the defenses or excuses to be treated at other places. Courts cannot state all the law of a case in one instruction or on one page. We see no merit in this assignment, and overrule the same.

The basis of the eighth assignment is the following instruction, in substance: That if the intestate appeared in front of the engine or in striking distance before the accident, it was the duty of the company to observe all the statutory precautions, together with any other means at its disposal to stop the train; but if by reason of the sudden appearance upon the track of Johnson or proximity

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thereto and speed of the train, it was impossible to observe all precautions, it was the duty of the engineer to perform all of such requirements under all the facts of the case as were best calculated and most effectual to prevent collision if he had time to comply with said precautions.

This instruction is also criticized because it injects the sudden appearance feature. We have commented upon this some two or three times and shall not repeat. But it is urged as the chief criticism that the Court told the jury that if Johnson appeared on the track before the train at any time, however long before the accident, and if there was not at any previous time some person on the lookout from the engine, there would be liability. We do not believe that the charge is susceptible of this construction when considered in all its connection. The jury evidently understood that the conduct of the trainmen immediately before and at the time of the accident only was under consideration. In fact, there was no evidence as to what the trainmen were doing except within a short time before Johnson was killed. Hence, the jury evidently understood that the language had reference to the immediate occasion, and that they could not have thought that a failure to show some one on the lookout a half mile or so from the scene of the accident would have made the railroad company liable. We overrule this assignment of error.

The predicate of the ninth assignment was the refusal of the Court to charge a special request to the effect that if the deceased was upon the track and within striking distance of the train and the defendant had its engineer or other person on the locomotive on the lookout ahead and as soon as the deceased could have been seen by the lookout the engineer sounded the alarm whistle, put on the

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brakes and did all they could to stop the train, the defendant would not be liable.

We are of opinion that the Circuit Judge announced this, both in his general charge and in giving special instruction No. 6. We overrule this assignment.

In the tenth assignment it is urged that the Court wrongfully declined the following special request, in substance: I further charge you that the law does not require an impossibility of railroads, and that if the engineer was on the lookout ahead and saw the deceased as soon as he could have been seen, and that he then blew his whistle and did all that he could to stop the train and prevent the accident, the company would not be liable. Here again we think the matters were covered, particularly by a certain special request, No. 6, given at the instance of the railway company. We in this connection remark that this special request six sets forth succinctly the whole theory of the railroad company, and that it needed no repetition by additional instructions.

In assignment No. 11 it is complained that the Court erroneously instructed the jury as follows: "If said Johnson was on the track or so close to the rails that he was in striking distance of moving trains and in front of the engine, either standing or walking or sitting or asleep on the track or so near as to be struck by the engine, he was guilty of contributory negligence," etc.

It is urged that the Court in this instruction omitted the contention of the railway company that he was drunk or asleep; and it is urged that this error of the Court was accentuated by his refusal to give in charge the special request mentioned in assignment No. 12, in which the fact that deceased was drunk or asleep was specifically mentioned.

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The instruction given was in effect that if Johnson was upon the track, whether walking or sitting or asleep, the fact should be taken into consideration in mitigating damages, as he would be guilty of contributory negligence. It may be said that the fact that he was drunk would have aggravated his contributory negligence, and we are inclined to the view that this position is sound. But at the same time we do not believe it of sufficient importance standing alone to be ground for reversal. For the Court distinctly informed the jury that the attitude of the defendant, however caused, that is, by sleep or intoxication, made him guilty of contributory negligence. Nevertheless, as intimated above, if Johnson was intoxicated, and there was evidence tending to show this, the jury might have found him guilty of a greater degree of contributory negligence than they otherwise would, and there would have been no error in giving the special instructions mentioned in assignment of error No. 12. But we shall overrule these two assignments as not justifying reversal, at the same time reserving them for comment in connection with the assignment that the verdict is excessive.

The basis of assignment No. 13 was the refusal of the Court to give in charge the special request in substance that if because the summit of the hill or that part of the locomotive the deceased could not have been seen until it was impossible to stop the train and prevent the accident there could be no recovery if the jury found that someone was properly on the lookout and that everything was done that could have been done to prevent the accident after the deceased was seen or could have been seen. We are of opinion that the substance of this was stated in giving other special instructions and that the refusal to give this was not erroneous. Courts are not required to re-instruct juries in the language desired by counsel.

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In assignments Nos. 14 and 15 it is complained that the Court erroneously refused two special requests, calling attention of the jury to the fact that if the experiments as to distance presented by plaintiff's witnesses were not in accord with the facts of the case as to the position of the deceased, then the evidence was to be treated as incompetent. One remark will suffice, and that is that a preliminary question, namely, the approximation of the experiments to the actual conditions, was for the determination of the trial judge before evidence of the tests were admissible. Again, the Court did in a pointed instruction tell the jury that if there was a discrepancy of the time and places pointed out by the railway company, the evidence of the experiments should be disregarded. We believe that this sufficed as instructions upon the subject. The same remarks will do for assignment No. 16.

The next assignment is headed "No. 18," and we shall treat it as such. It is to the effect that the Court failed to tell the jury as requested that if Johnson died instantly there could be no recovery for pain or suffering. This request should have been given, as there was evidence to the effect that he died instantly, or that his suffering was bound up with and was a part of the death agony. When such is the case there must be no award for pain. *Railroad v. Craft*, 237 U. S., 648. But we are not going to treat this as error justifying reversal, in view of our remarks in disposing of the next assignment. In the last assignment the verdict of \$1,200 is assailed. It is rather unusual to criticize a verdict of that amount in a death case as being large; and ordinarily we would summarily overrule an assignment of that nature in a case like this. But because of two errors committed by the Court having direct bearing upon the amount of damages we are going to suggest a remittitur as a means of curing those errors

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and obviating a new trial. There can be no doubt that Johnson was guilty of the grossest negligence, whether drunk or sober. We have for long observed the practice of the Supreme Court in cases of this class, and find that they are restricting recoveries to the neighborhood of \$1,000.

While in the instant case Johnson was shown to be in good physical condition, with an expectancy of about thirty years, his earning capacity was small. In view of the fact that if this were a common law case there could be no recovery, the amount to be awarded for collisions resulting in death of parties on railroad tracks must be kept at a very low figure.

We have considered this whole case and have reached the conclusion that if the defendant in error will enter a remittitur of \$200, judgment for the remainder with cost will be entered. In case of refusal so to do the cause will be remanded for a new trial at the cost of defendant in error.

Bowers v. Railway.

T. E. BOWERS, ADMR., v. N., C. & ST. L. RY.

Writ of certiorari denied by Supreme Court, 1916.

CARRIER OF PASSENGER. *Drunken passenger. Duty of former with respect to latter.*

The law does not onerate the conductor or flagman upon a train upon which a drunken person has taken passage with the duty of neglecting everyone else and constantly watching him, especially in the absence of conduct indicating a total lack of self-control.

FROM DAVIDSON COUNTY.

Appeal in error from the Circuit Court of Davidson County.

B. A. BUTLER for Plaintiff in Error.

CLAUDE WALLER for Defendant in Error.

SPECIAL JUSTICE R. H. SANSOM delivered the opinion of the Court.

THIS is a suit for damages for personal injuries growing out of the death of James Lawson Funston by and as a result of an accident during the time he was a passenger upon one of the trains of the defendant railway company.

The suit was begun in Davidson Circuit Court for damages for twenty-five thousand dollars in favor of the plaintiff, F. E. Bowers, as administrator of the deceased.

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The declaration avers that the deceased, J. L. Funston, on the ——day of September, 1913, bought a ticket from the defendant railway company through its agent at Nashville, Tennessee, paying therefor the regular price charged, the ticket covering passage between Nashville, Tennessee, and Morrison Station, Tennessee, a regular stopping place on the defendant's line of railway, the ticket being one for first-class passage between these points.

The declaration alleges that for the consideration paid for the ticket the defendant company promised and agreed that it would safely and carefully carry plaintiff's intestate from Nashville to Morrison Station, and that the deceased entered upon the cars of defendant as a passenger under said contract; that he was carried in the car in which he first seated himself to Tullahoma, Tennessee, and there, by the direction of the defendant railway company, change cars and entered another passenger coach and seated himself as a passenger therein, this coach composing a part of the train on the branch line leading from Tullahoma by and beyond Morrison Station, his destination under the ticket purchased.

It is averred that at the time the deceased applied for, paid for and purchased the ticket aforesaid; at the time he entered the cars of the defendant company at Nashville, he was in an intoxicated condition to such extent that the company's agent who sold him the ticket could and did see and appreciate his intoxicated condition and the condition of his mind, and that when the deceased changed cars at Tullahoma to the branch line he was in a very high state of intoxication and he was permitted by the defendants, or its train operatives, to drink whiskey during the passage from Nashville to Tullahoma, and that this was permitted while he was in a drunken and crazed condition from drink.

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It charges that after he entered the cars at Tullahoma upon the branch line, he continued to drink, and as a result thereof became insensible and oblivious of his surroundings and of the perils and dangers he was negligently permitted to be exposed to by defendant, and while in this insensible, insane and crazed condition he was permitted by defendant, who had knowledge of his condition, to leave the passenger coach and get out on the brakes of the car and sit there while the car was in motion, which was a very dangerous and perilous place; that he was permitted to go out upon the platform and get out on the steps of said platform, and while holding to the rail or rods on each side of the steps with his face toward the car platform that the back part of his head came in contact with and struck an overhanging plank or other obstruction that defendant negligently permitted to project from a stock pen or cattle guard, and thus and in this way his skull was crushed by the impact with said projectile, and by the lick he was wrenched from his hold on the bars and was thrown violently to the ground; the cars then running and continued to run at a rapid rate of speed, and as a result of the injuries thus inflicted he died.

The declaration avers that the defendant was guilty of gross negligence and a breach of duty that it owed to the deceased as a passenger, after having become acquainted with his unconscious, insane and crazed condition, in not protecting him from danger and not averting the dangers to which he was submitted by providing means and ways to keep him away from the dangerous and perilous places, and in not exercising that high degree of care that the law required to be given drunken and insane passengers that are incapable of exercising any care upon their part for their safety.

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To this declaration the defendant company interposed: First, plea of not guilty; second, plea of compromise and settlement; third, plea of release and discharge from liability; fourth, for further plea defendant says that the plaintiff is not the administrator of the deceased, J. L. Funston, for whose injury and death the suit is brought; fifth, for further plea it says that the appointment of the plaintiff as administrator by the County Court of Davidson County was without authority, and unlawful and void.

The case was heard upon the issues thus made, before the Court and jury. Whereupon at the completion of all the testimony, upon motion of defendant, the Court peremptorily instructed the jury to return a verdict in favor of the defendant, which was accordingly done, and judgment pronounced dismissing the suit and taxing the plaintiff with the cost.

Whereupon motion for new trial was made upon the following grounds:

(1) "The Court erred in giving peremptory instructions to the jury and directing them to return a verdict in this case. There were controverted questions of fact that was the province of the jury to determine under proper instructions of the Court on question of defendant's liability to the deceased's administrator for the acts or conduct in not avoiding or preventing the injury. This question involves the question of defendant's knowledge of deceased's drunken condition prior to his injury and their knowledge of his going into perilous and dangerous places; and also the question as to whether they could by the exercise of due care and caution have prevented the accident and saved his life.

"These questions are peculiarly questions for the jury, and they should have been permitted to pass upon them."

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(2) "The jury should have been permitted to pass upon the release set up as a defense in this case and determine whether or not the same was fraudulently obtained and executed, and also the other questions set up plaintiff's replication and as to whether or not the settlement, if considered as such, was adequate or sufficient, to compensate the beneficiaries named in the declaration for the life of the deceased."

(3) "The plaintiff will move the Court to permit him to read affidavits and produce oral testimony as to newly discovered evidence, touching the question as to when intoxication of a party becomes such that his drunkenness is involuntary."

(4) "There is no evidence to sustain the verdict of the jury for defendant in this case so directed by the Court."

(5) "The preponderance of the evidence, and the greater weight of the evidence is against the directed verdict of the jury."

This motion was overruled and judgment pronounced in accordance with the verdict, responding to the peremptory instructions given them by the Court to return a verdict in favor of the defendant, as shown. Among the errors assigned is one that there is no evidence to support.

It appears that on the 4th day of September the plaintiff's intestate bought a ticket at Nashville from the agent of the defendant company, for passage from Nashville to a station on the McMinnville branch of the railroad called Morrison. At the time he purchased the ticket he was perhaps in company with one Leonard Russell, who was a witness in this case, and who was a friend and companion of the deceased. There is no question under the facts disclosed in the record but that at the time he purchased the ticket he was drinking and that he was to a degree under the influence of liquor. After he had bought his ticket

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and it had been delivered to him, he did not wait for his change, but walked off, his gait being perhaps unsteady, leaving the change lying upon the counter, and his companion went forward and took care of the money for him.

The deceased and Russell proceeded from the waiting room in which was the office where he purchased the ticket out through the depot, down the steps and out to the train upon which his passage was to be made. He was to a degree boisterous and profane in his use of language, and was unsteady in his gait. It was apparent that he was under the influence of intoxicants.

Little of moment seems to have transpired between Nashville and Murfreesboro, where he got off the train, saying that he wanted to see some friend of his there, and it was suggested to him by some one of the employes, either the conductor or brakeman, that they did not think that this friend would be glad to see him, indicating that in his then condition they would perhaps not care to see him.

The deceased again boarded the train at Murfreesboro and went forward on his journey to Tullahoma without any happening of moment, it being apparent from the disclosures of witnesses that he was active, frequently walking through the train from one coach to another, and talking some in a loud tone, using some profanity.

At Tullahoma he got off the train for the purpose of making change to the branch line over which he was to make the remainder of the trip to Morrison Station. He had some conversation there with the brakeman of the defendant company, wanted him to go aside with him for the purpose of taking a drink. The brakeman seems to have refused. He wanted to know whether he would have time, with his friend Russell, to take lunch before the train started and he was advised by the brakeman that he would

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have perhaps five minutes. Whether he took lunch or not is not disclosed. He was upon the train when it started to McMinnville.

During the period of that part of the trip he seems to have been restless and in motion most of the while, walking through the cars; standing out upon the platform; turning the brake, and the conductor and brakeman seem to have spent some of their time in an effort to stop him from sitting upon the brakes and turning them or standing or sitting upon the platform, and according to the evidence, at their request he went into the coach a number of times from the platform without resistance or objection. On one occasion the conductor locked the door of the coach to keep him from going out upon the platform.

Just before the train was to have reached his point of destination the deceased went to sleep while sitting in one of the coaches and slept for ten minutes or more, and upon waking he again became restless and went from the coach out upon the platform and was seen to have been standing upon the lower step on the end of one of the cars, holding on to the hand rail of the step with his right hand, leaning out from the car and waving his left hand, and while standing upon this step and swinging out from the car, and within a half a mile of the end of his journey, while the train was going at a rapid rate of speed, perhaps in excess of twenty miles an hour, his head came in contact with a plank or other projection from a cattle guard, with the result that his skull was fractured; he was dashed from the train a very few minutes before the end of his journey, the fact of his being injured not being known to the conductor until a few moments thereafter when they had reached the station, and the train was, immediately upon letting the passengers alight, returned to the point of his injuries and his body placed in the bag-

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gage car and carried perhaps to McMinnville, where the attention of a physician was secured, the physician being in readiness upon the arrival of the train by telegraphic appointment made in advance. Nothing seems to have been left undone to properly administer to his condition, but without avail, and he died as a result of his injuries within a very short while.

It is clear from the record that the deceased was drinking at the time he purchased his ticket, and at the time he got on the train at Nashville he had several bottles of whiskey in his pocket, but this fact was not known to the railroad employes, so far as the record discloses. It is further clear that he continued drinking throughout the period of the journey covered by his ticket between Nashville and Morrison Station.

It is apparent that his state of intoxication was on the increase rather than decrease from the beginning of his journey to the end thereof. It is equally apparent that he was not in a helpless condition because, according to the proof, he was in a state of motion and activity practically all the while during the period of his journey, getting off the train at Murfreesboro, as stated, and getting back on without any assistance or any suggestion of any need of assistance to do so, and at Tullahoma, likewise alighting from the train without assistance and getting aboard again. There is nothing in the record that establishes the fact or leads the Court to believe that this passenger was in a crazed, insensible, unconscious or insane condition during the period of his journey covered by the ticket purchased.

The Court is of opinion, under the facts of the case that the deceased was not in such intoxicated condition as that he was excused from the exercise of proper care and prudence for the protection of his own person. He was not

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so much intoxicated as that he could not readily have seen and appreciated the fact that the cars were not vestibuled. He was not so much intoxicated as that he was not charged with the care commensurate with the conditions existent on the train upon which he had passage.

Every common carrier of passengers must exercise and is charged with a high degree of care in respect of its equipment being safe and its operation being careful, but it is not required that every passenger train shall be equipped according to the highest state of the art of equipment. The rule does not provide that all trains carrying passengers shall be equipped with vestibule cars. There is no evidence in the record in this case tending to show even that there was any defect in the equipment or management of this train of any character other than that it was not vestibuled.

This passenger, according to the facts disclosed in this record, was given such time and attention of both the conductor and brakeman as they could afford from their duties to the remaining passengers upon the train. The law does not require a railroad company to give all of the time and attention of the employes in charge of its trains to the care and assistance of any one passenger; all that is required is that special assistance be given to such passengers as are suffering from some illness or infirmity that renders them either totally or partially incapable of properly caring for themselves. The authorities are numerous upon this question and authorities therein cited. *Railroad v. Fleming*, 14 Lea, 150; *Railway v. Shaw*, 2d Cates, 477.

There is no evidence in this case of any liability or incapacity on the part of the deceased to handle and care for himself. On the contrary, a record rarely comes before the Court demonstrating a greater degree of activity than was displayed by the plaintiff's intestate in this case.

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There is no evidence in this case, according to the Court's view, establishing or tending to establish the fact that the plaintiff's intestate was in a crazed, insensible, unconscious or insane condition or required any attention because of such condition.

An interesting case upon the subject in hand may be found in 5th Higgins, 491, being the case of the *L. & N. R. R. Co. v. Hall and Cooper, Administrators*.

We do not think that there was any evidence in this case, based upon which the jury would have been justified in pronouncing a verdict in favor of the plaintiff, and hence the lower Court was right in sustaining the motion for peremptory instruction in favor of the defendant.

This being decisive of the whole case, other errors assigned need not be considered.

The judgment of the lower Court dismissing the case is affirmed with costs.

Waterhouse v. Sterchi Bros.

E. WATERHOUSE V. STERCHI BROS.

Affirmed as to result by the Supreme Court, 1917.

1. **BILLS. AND NOTES** *Suit against endorser. Exhaustion of remedies.*

A payee of a promissory note is not required in suit thereon against an endorser to aver exhaustion of remedies against the maker.

2. **SAME.** *Failure to sue maker.*

Nor is such payee required to sue the maker as a condition precedent to action against the maker.

3. **PLEADING AND PRACTICE.** *Profert in declaration of note.*

The words, "here to the court shown," inserted in a declaration upon a note do not make the note a part of the declaration.

4. **SAME.** *Description of note. Demurrer.*

But upon demurrer without craving over the court must presume that the note is as described in the declaration.

5. **MOTION IN ARREST OF JUDGMENT.** *Appellate court confined to grounds specified in trial court.*

Appellate courts will in reviewing motions in arrest of judgment confine themselves to the grounds specified in the trial court.

6. **SAME.** *Repeating grounds set forth by demurrer.*

Party moving in arrest of judgment is not permitted to repeat matters embraced in an overruled demurrer.

7. **SAME.** *Matter furnished or capable of supply by proof.*

Nor can such movant rely upon the omission of matters which were or could have been supplied by proof. The presumption will be indulged that all essentials to a recovery were presented to the trial court.

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8. **SAME.** *Motion in arrest is not available.*

Where substantial justice within the law has been reached, motion in arrest will not avail.

9. **BILL OF EXCEPTIONS.** *Absence of. Presumption.*

It will always be presumed in the absence of a bill of exceptions that there was submitted to the lower court sufficient competent evidence to warrant the judgment.

10. **SAME.** *Suit upon promissory note made profert of in usual way.*

And such presumption obtains with respect to a written document made the foundation of the action and yet not marked filed as evidence, nor made part of the pleadings.

11. **VARIANCE.** *Summons showing corporation as plaintiff. Declaration averring partnership. Presumption.*

Where the declaration indicates that plaintiff is a partnership and not a corporation as revealed by the summons the presumption will be indulged that the summons was amended or so treated as to conform to the declaration.

12. **SAME.** *Error not reached by motion in arrest.*

And such variance cannot be reached by motion in arrest of judgment.

FROM RHEA COUNTY.

Appeal in error from the Circuit Court of Rhea County.
FRANK L. LYNCH, Judge.

GEO. H. WEST for Plaintiff in Error.

RANKIN & FRAZIER for Defendant in Error.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

Waterhouse v. Sterchi Bros.

DEFENDANT IN ERROR brought this suit against plaintiff in error, E. Waterhouse, for the purpose of recovering against him the amount of a note, interest and attorney's fees, aggregating some \$1,500. Judgment was rendered thereon in favor of the defendant in error after a hearing before the Court without the intervention of a jury. From this judgment plaintiff in error appeals, and through able counsel has attacked the judgment from several angles.

Notwithstanding the technical defenses (defenses which under the Act of 1911, Chapter 34, must not stand in the way of an affirmance where the merits have been reached and justice has been done), the case has given us much concern.

The first assignment of error is that the Court should have sustained the demurrer interposed to the declaration. The declaration is in the following form:

"Plaintiff sues defendant for \$1,287.14, together with interest from date, and 10 per cent of the principal and accrued interest for attorney's fees, due by promissory note here to the Court shown, made by the Dayton Furniture Company and J. D. Patton to plaintiff on August 15, 1914, and due twelve months after date, of which note defendant was an endorser. Said Dayton Furniture Company and J. D. Patton have been declared bankrupts and the amount of which note with interest remains unpaid, though demand of judgment has been duly made."

The demurrer is in substance that the sole ground of liability alleged is that plaintiffs are payees of a promissory note of which the defendant was an endorser, and it is not alleged that plaintiffs had exhausted their remedies against the alleged makers of the said note; and that the makers are not made parties.

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It will be noted that the only objection raised by this demurrer is that plaintiffs had not exhausted their remedy against the makers and could not therefore sue an endorser upon his secondary liability. It will be observed that the failure of the declaration to aver notice of non-payment is not relied upon.

We are of opinion that the declaration is good as against the challenge made by the demurrer. It is true that an endorser is secondarily and conditionally liable on a note. But at the same time after demand and notice he becomes jointly liable with the maker and may be held by the payee in a separate action. *Lawson v. Watson*, 8 Baxter, 72; 3 R. C. L., page 1139.

It is also urged that the payee of a note cannot sue an endorser, for the reason that there is no contractual relation between the two. This is in general the case, but there are exceptions which may be implied in order to save an otherwise good declaration against demurrer. For instance, an irregular endorser can be held liable to a payee. Also the payee may transfer the paper and subsequently become repossessed of it, and thus hold an endorser liable.

It would have been better had the pleader used more amplified terms. But we are of opinion that the declaration cannot be held bad for mere failure to aver exhaustion of remedies against the makers.

We are assuming that this question will have to be disposed of upon the supposition that the note is not made a part of the declaration. It is true that the usual words of proferat are inserted in the declaration. But according to the practice obtaining in this State the instrument does not thereby become a part of the pleading. *Insurance Co. v. Thornton*, 97 Tenn., 1. However, there is no criticism

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of the manner of exhibition, nor is there any contention of a variance between the note and the averments. Hence, we are bound upon demurrer to presume that the note was just as described in the declaration.

As before stated, the demurrer was overruled and the cause went to trial upon a plea of *nil debit*, with the result heretofore announced.

All subsequent errors are predicated upon a refusal of the Court to sustain the motion in arrest of judgment made by Mr. Waterhouse. We need not notice the errors specifically, for the reason that some three or four points raised can more logically be treated in a general way. We are, of course, confined to the reasons in arrest specified in the lower Court, and we shall now turn to those grounds. The first point raised is that as plaintiffs were payees of the note there was in them no right of action without allegations sufficient to charge plaintiff in error as endorser. It must be borne in mind that the Court heard the evidence and concluded that plaintiffs below were entitled to a recovery; and as there is no bill of exceptions we are bound to presume that the Court heard evidence sufficient to warrant the judgment. And while it may be true that the note copied into the transcript is not a part of the record for lack of identification by the judge or the clerk, at the same time we are required to presume that the note was exhibited to the Court without assailment upon the part of defendant below. See 31 Cyc., 547, and appended cases. It will be seen that by the mere use of the term made sacred by centuries of use the instrument sued on is shown to the Court and to the opposite party. The inference in the absence of *non est factum* or an objection of variance is that the instrument presents an obligation according to the tenor of the

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declaration, and that the defendant is held liable thereon. Hence, we must conclude that the Court after inspection and consideration of the oral proof concluded that the defendant below was answerable to the plaintiffs. It is axiomatic that matters supplied or capable of being supplied by proof cannot be made the basis of a motion in arrest of judgment. And as we can conceive of various kinds of endorsements making an endorser liable to the payee, we must in the absence of the bill of exceptions presume that one of these grounds of liability was shown.

The second ground urged is that the declaration failed to aver notice of dishonor or an excuse for not giving this notice. The declaration should have been more ample upon this point; but nevertheless we do not believe that it can be taken advantage of by motion in arrest of judgment. At the expense of repetition, we assert that an endorser can be held liable to the payee or anyone without there having been any presentment for payment and notice of dishonor, and that under a declaration unchallenged for lack of averments excusing notice a case may be made out against such endorser. In the absence of a bill of exceptions we are constrained to presume that the Courts had warrant for finding Mr. Waterhouse answerable as an endorser. It is true that we have had many cases in Tennessee ruling that a declaration against an endorser which is short of the allegations of notice or an excuse for not giving notice is bad. But a critical examination of them in connection with our rule that a motion in arrest of judgment is not good after a general verdict upon matters which must necessarily have been shown to warrant a recovery, will bring to light and reinforce the conclusion that the defendant was confronted at the hearing with evidence sufficient to justify his being held liable. *Bruce v. Beall*, 100 Tenn., 573.

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The third ground of arrest is identical with that embraced in the demurrer. This must be treated as insufficient for two or three reasons. In the first place, a challenge to a declaration urged by demurrer cannot be repeated in a motion in arrest. 15 R. C. L., 684. Again, we have held that the matter urged in the demurrer was not sufficient to destroy the pleading.

The fourth criticism is that the defendant below was required to answer the defendant as a corporation, while in the declaration he is sued by a partnership. This does not expressly appear, but is arrived at by plausible inferences. For instance, it is urged that the phraseology used in the summons indicated a corporation according to the authorities, and that in the declaration plaintiffs are set forward as partners. Be that as it may, plaintiff in error cannot raise this objection by motion in arrest. Presumptively, the declaration sets forth the status of the plaintiff and his right to sue; and if there be a variance between the summons and the declaration the implication is that the summons was amended so as to conform. But in addition to that, this is a mere matter of variance which is cured by a verdict and judgment and cannot be urged by a motion in arrest. *Johnson v. Bank*, 1 Humph., 77; *Shelby County v. Bickford*, 102 Tenn., 403.

The fifth ground of arrest is too general to be noted. We are of opinion that none of the grounds urged will suffice to arrest the judgment, and yet we must pay learned counsel the tribute of pointing out many seemingly vulnerable stages in the proceeding. But we are persuaded that most of the reasons urged were occasioned by the assumption by learned counsel for plaintiff below that no real defense existed against the note. Apparently this is so, and being so persuaded we fall back upon the old

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as well as the new rule that a motion in arrest of judgment will not be entertained where substantial justice has been reached and where the reasons urged are purely technical. 15 R. C. L., 686, at top of page.

The judgment is affirmed with costs.

JOHNSON CITY V. UNAKA MILLING CO., ET ALS.

1. WRIT OF ERROR CORAM NOBIS. *Not a new suit.*

A writ of error *coram nobis* is not a new suit. It necessarily appertains to a former proceeding.

2. SAME. *Well recognized and useful remedy for correction of errors of fact.*

This is a well known and useful remedy for the correction of errors of fact; and the old rule forbidding the vacating of judgments and entries after adjournment does not stand in the way of its application. Any practice enabling a trial court to do justice on review is to be commended.

3. SAME. *Averments of petition as to matters of fact assumed to be true upon motion to dismiss.*

The averments of such a petition with respect to matters of fact are accepted as true upon motion to dismiss.

4. SAME. *Proper remedy to have an unwarranted judgment of dismissal vacated.*

This writ is an appropriate remedy for the vacating of an order of nonsuit and dismissal obtained under a mistake of fact or by fraud or surprise.

5. SAME. *Not fatal to writ to embrace also questions of law.*

In such case it is not fatal to such writ also to embrace questions of law if those questions be admixed with matters of fact.

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6. **EMINENT DOMAIN.** *Right to dismiss petition for condemnation. Too late after possession taken.*

Condemning party cannot, after taking possession of the property sought, voluntarily dismiss a condemnation suit.

7. **SAME.** *Vesting title. No Jury of view necessary.*

Where the condemnor has by consent taken possession of the property desired, the only question remaining is the amount of damages; and in such case the condemnor becomes a virtual defendant and therefore powerless to dismiss.

8. **MUNICIPAL CORPORATIONS.** *Immunity from suit elsewhere than in county of situs. Does not prevent city becoming actor. Estopped.*

A municipal corporation which institutes a condemnation suit in another county than that of its situs and takes possession of the property, cannot thereafter dismiss such suit and defend this step by relying upon the rule of immunity from suit except in its own county afforded by the law.

9. **NONSUIT.** *No notice of motion for generally required. But otherwise if defendant's rights necessarily prejudiced.*

While there is no general rule requiring the giving of notice of an intention to take a nonsuit, notice should be given where prejudice to the rights of defendant unavoidably follow such step. And failure to give notice may be shown to have been one feature of a scheme to defraud.

10. **CERTIORARI AND SUPERSEDEAS.** *Application to appellate courts. Proper remedy to vacate illegal or unwarranted entries. Interlocutory or otherwise.*

Writs of certiorari and supersedeas are suitable remedies for the vacating by the appellate courts of illegal and unauthorized entries and actions of trial courts made or taken during the progress of a cause.

FROM UNICOI COUNTY.

Application for writs of certiorari and supersedeas.

Johnson City v. Milling Co.

GEORGE W. SELLS for Petitioner.

JAMES B. COX for Defendants.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

THIS is a petition by Johnson City for a *ceritorari* to supersede and annul certain orders made by the Circuit Court of Unicoi County a condemnation proceeding. The petition is preferred upon the theory that the orders attacked were illegal in that they were beyond the jurisdiction of the Court or were made at a time when the Court did not have the right and power so to do. The following is a brief history of all the transactions which led up to the present litigation.

Johnson City is a municipality specially empowered to install waterworks, and to that end to condemn the water and riparian rights of individuals in Washington and adjacent counties. In 1912 it instituted in the Circuit Court of Washington County a condemnation proceeding against the above named defendants for the purpose of condemning and acquiring a certain spring and certain rights in the waters of Indian Creek, properties lying in Unicoi County and claimed or owned by the defendants. This petition was in the form generally used in eminent domain cases, and it concluded with prayer for notice and also for the appointment of a jury of view to assess the damage of the defendants. It seems that the defendants were specially notified that at the September, 1912, term of the Court the petitioners would make application for the appointment of a jury of view. In August preceding the defendants lodged with the clerk of the Court a protest against the issuance of any writ of inquiry, and none was ever issued.

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It appears that shortly after the institution of the condemnation suit the defendants and other citizens of Unicoi County began proceedings in the Chancery Court of that county for the purpose of testing the right of Johnson City to enter the county and appropriate the waters of any of its streams. While not clearly stated, it is evident that some sort of an injunction against any effort to acquire the waters on the part of Johnson City was issued.

During the pendency of this Chancery case no active steps were taken in condemnation suit either by the petitioner of the defendants. This was occasioned by an agreement entered into between the parties in December, 1913, to the effect that no steps would be taken in the case pending the Chancery suit. This latter litigation was finally determined in the Supreme Court in 1914. The decision was that Johnson City had the power to go into Unicoi County and condemn and appropriate waters and water rights for municipal purposes.

On January 11, 1915, Johnson City, through its attorneys made a motion in the Unicoi Circuit Court for permission to dismiss and discontinue the condemnation suit which it had instituted against the defendants. This motion was allowed and the suit was dismissed and entry made to that effect upon the minutes.

In the following March defendants made an effort to have the order of nonsuit vacated and the cause restored to the docket. The Circuit Judge was of opinion that he could not entertain this motion because of the lapse of more than thirty days, but suggested that writ of error *coram nobis* be resorted to for the purpose of obtaining relief. Thereupon the defendants filed such writ, and it is because of the entertaining of this writ by the Circuit Court that the present application is made.

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It was averred in substance in the petition for the writ of error that the nonsuit was taken without notice to the defendants, and in violation of an agreement which will be hereinafter referred to, and also without knowledge thereof upon the part of the petitioners and without disclosing to the Court the true facts. It was also averred that a Dr. Hannum was the principal defendant, and was at the time the nonsuit entered desperately ill to the knowledge of the petitioners and unable to attend Court or to attend to his affairs. It was also alleged that pursuant to the agreement before mentioned and also pursuant to the condemnation suit which was entered the city had taken possession of the property and had damaged the water rights of the defendants. It was then averred that had the facts been known to the Court the order of dismissal would not have been entered. This petition was followed up by formal assignment of errors of fact as is prescribed for such writs. The defenses urged by the city were first that it could not be sued in Unicoi County; that the Circuit Judge was without power to vacate the order of dismissal; that the case had been terminated and the defendant deprived of the right or power to proceed. These defenses were followed by a subsequent denial of the sufficiency of the petition in law, and likewise a denial of the matters of fact therein averred. It was also contended that the mistakes of the lower Court, if any, were matters of law such as were not curable by this writ, and further that the petitioners were guilty of gross negligence in not attending to their side of the litigation. The Circuit Judge overruled or struck out or treated as invalid all dilatory defenses and held that the city must go to trial upon the issues presented, and directed that the writ embracing those issues stand as returnable and triable

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at the succeeding term. These are the orders which are sought to be superseded.

We have given this case thoughtful consideration and have reached the conclusion that the *certiorari* should be denied. We shall briefly state our reasons for so holding, attempting, however, to respond substantially if not pointedly to all the contentions made in support of the application for a superseding order.

It is first said that the writ of error *coram nobis* is a new suit, and being such cannot be brought against a municipality of Washington County in any other county than that of its situs. It seems to be settled in this State that a municipality is subject to suit only in the county in which it is situated. But this rule does not prevent the municipality from becoming an actor in another jurisdiction in such way as to estop itself to question the jurisdiction. But we shall return to this feature.

It was held by some of the earlier cases that a writ of error *coram nobis* was a new suit. It was demonstrated in the case of *Wills v. Wills*, 104 Tenn., 382, that the pronouncements of the earlier cases were incorrect, and that the process was merely for the correction of the errors and had to be brought in the Court in which the original suit was tried. We are surprised that any other view was ever entertained. The very purpose of such proceeding is to have a Court which has pronounced an order vacate the same and leave the original cause as if the annulled order had not been entered. Now, if it is not a new suit and if it be for the correction of errors, and especially if it be an effort to restore the original status of a cause lawfully brought, then the question of jurisdiction made by Johnson City must fail, it having once committed itself as an actor to the jurisdiction and powers of the Unicoi Circuit Court. It cannot be heard to say

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that it invoked a power which did not exist and acquired property for which it is not ready to make compensation.

Again, it is said that Johnson City had the absolute right to discontinue its condemnation proceedings, and that this could not be called in question either at the dismissing term or any subsequent term. The case of *Cunningham v. Terminal Co.*, 126 Tenn., 343, is cited as conclusive of this position and as rendering useless any debate. We have carefully re-read that decision and find therein two or three propositions which demonstrate that the petitioner did not at the time it took the nonsuit in question have the right to discontinue, assuming for the time being that the statement of fact of the Hannum petition that the city had taken possession of the property be true. It is stated in the Cunningham case that it is too late to dismiss if title has been vested or possession has been taken. This is also the rule laid down in Lewis on Eminent Domain, section 954, 3rd Ed. We draw a distinction between the abandonment of an enterprise by the condemning party and the abandoning of suit. The former is generally allowed. The latter is denied where possession has been taken and the property used. This is the only just rule. So that the city should not have been allowed to dismiss the proceeding at the time the nonsuit was entered. In other words, at that time it had become the *defendant* in the proceeding, and therefore powerless to dismiss the suit, and thus remitting the land owners to a doubtful independent suit to recover the value of property which had been taken.

We interpret the agreement made with reference to the pending case as a stipulation that the only questions to be determined after favorable termination of the equity suit would be the amount of damages to which the defendants were entitled and the proportions in which the dam-

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ages would be shared. It was recited in this agreement in substance that the suit was properly brought, and that the defendants were the owners of the land, and that each might show his respective interest, and that damages should be accordingly adjudged. But in addition to this, it is alleged in the petition that by virtue of this agreement as well as by the suit Johnson City took possession, and this, of course, must be treated as having been done by consent, as the Court will not presume an unlawful entry.

It is said that no jury of view had ever made a report, that there was no confirmation of report, and no vestiture of title in the condemning party. Again, referring to our duty of assuming the facts to be as stated in the petition, we have the case of a condemning party who is given possession with mere reservation of the question of damages to be subsequently determined. In such case it is unnecessary to have formal entry or a full report and vestiture of title; or as for that matter it is wholly unnecessary to have any jury of view at all. The only thing left to do is to have the question of damages determined by a common law jury: *Power Co. v. Lay*, 182 S. W., 253.

But it is urged that the Circuit Judge had no power at a subsequent term to revoke an order pronounced at a preceding term. This is the general rule, but it must yield to those exceptions provided by statute for correcting or annulling judgments and decrees. The very purpose of the writ of error *coram nobis* is to show at a subsequent term and within twelve months that the Circuit Judge was in error with respect to facts which if present or known would have prevented the entry of the judgment in question: 7 Ency. Tenn. Dig., page 604. Any practice which enables a trial Court to correct its errors and do justice and obviate an appeal should be commended.

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It is next contended that the errors were matters of law and not those of fact. This will have to be determined upon a hearing of the matters raised by the petition. We are convinced that it cannot be determined upon the face of the petition that the errors are those of law. It is manifest that some mistakes of facts are averred. Whether they are sufficient to justify revocation is a question to be ultimately determined.

The sufficiency of the facts to warrant annulment is also challenged. We are persuaded after careful consideration that if the Court had known at the time of the taking of the voluntary nonsuit that the city had taken possession of the property pursuant to the action and the agreement, discontinuance would not have been allowed. We think this is reinforced, that is, that the Court would have been more disinclined, had he been aware of the agreement above referred to, and of the whole status of the case and of the parties. We think also that the fact that the landowners were ignorant of the motion to dismiss and were not anticipating any such step were matters of grave moment. All these facts and considerations would have been sufficient to have justified the denial of the motion to dismiss. It is also alleged that the step in question surprised the defendants and that it was a fraud upon them. There is warrant for these assertions, such warrant as entitles petitioners to a trial of the matters of their petition.

It is urged that the defendants in the condemnation proceedings were guilty of negligence. This negligence, if any, is not suggested by the averments of the petition. It is alleged that Dr. Hannum was ill and not present, and that he was not expecting any move to be made; that, in fact, by virtue of the agreement the landowners were the parties who were first to take action in the condemnation

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proceeding. These matters should be developed upon a hearing before it can be determined that the landowners were guilty of such negligence as would deny them the right to the remedy which they seek. It is axiomatic that a petitioner must be repelled if the mistake of the Court was occasioned by the negligence of the complaining party. But this is a question of fact. Besides, this question of negligence cannot be determined without taking into consideration the questions of surprise and of fraud which are suggested.

It is contended that no notice of the motion for nonsuit was necessary and that lack of notice cannot be urged as a ground of revocation. It is true that there is no statute or rule requiring notice of such nonsuit. But at the same time if there were substantial reasons why the dismissal should not have been had and if the party had no knowledge of the motion and no opportunity to resist, there arises a case in which a petition showing mistakes of fact might be presented to the Court as an inducement for annulment. In this connection it is pertinent to remark that if the situation was such as led the landowners to believe that no steps would be taken in their absence or without their knowledge, then the predicates of surprise and undue advantage may be said to arise.

Learned counsel for the city undoubtedly correctly conceived the practice to be that a *certiorari* and supersedeas would lie to supersede an unwarranted action or order of the Court; and this remedy might be resorted to in the midst of the subsequent proceedings provided the latter proceedings did not present debatable questions of fact. But we find in this case that the landowners are entitled to a trial of the questions or issues of fact tendered in their petition and that the Circuit Judge was not in error

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in receiving the petition and directing issue to be taken thereon.

If it turns out on final hearing that Johnson City never took possession of the property in question nor acquired title to it, then its order of dismissal must stand for the reason that at such juncture and in such condition of things it would have the absolute right to discontinue, and the question of good faith or surprise would be wholly immaterial. Our conclusion is that if it has taken possession because of the suit and the agreement it was too late for it to assume the position of a plaintiff and then dismiss.

It results that this petition will be denied and that the cause will stand in the lower Court for trial upon the petition for writ of error *coram nobis*. The city is taxed with the cost of this appeal.

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PEOPLES' SAVINGS BANK v. AMERICAN NATIONAL BANK.

1. **BANKS.** *Collection of drafts. Unknown peculiar customs of local bank not binding.*

The peculiar methods of collection pursued by a bank to which a draft for collection was sent are not binding upon draft owner unless he or his transmitting agent has knowledge thereof.

2. **SAME.** *Duty with respect to drafts. Should follow instructions.*

A bank accepting a draft for collection should follow instructions given at the time.

FROM WILSON COUNTY.

Appealed from the Chancery Court of Wilson County.
J. M. STOUT, Chancellor.

LILLARD THOMPSON for Complainant.

A. A. ADAMS for Defendant.

SPECIAL JUSTICE R. H. SANSOM delivered the opinion of the Court.

THIS case involves, and there is presented to this Court for its determination, the question of the liability or non-liability of the defendant bank to the complainant bank for the amount of a draft for \$388.09 forwarded for collection by the complainant bank to the defendant bank.

The bill avers that the complainant, Peoples' Savings Bank, is a Kentucky corporation, having its banking

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house and place of business at Henderson, Kentucky; that on December 8, 1911, the Henderson Produce Company of Henderson, Kentucky, shipped a carload of corn to the Cedar City Mills, at Lebanon, Tennessee, and drew a draft therefor on the Cedar City Mills for \$388.09, attaching to the draft the bill of lading for the carload of corn shipped; that the shipment was made "shipper's orders notified Cedar City Mills"; that attached to the draft were written instructions to the defendant, American National Bank, of Lebanon, to which the draft was sent for collection to "protest and telegraph if not paid when presented"; that the draft was received by the American National Bank, and that it held the draft until the 14th day of December, 1911, and on that day protested it; that the draft had been endorsed by Henderson Produce Company; that the Cedar City Mills, about December 12, 1911, deposited with the agent of the Tennessee Central Railroad at Lebanon, a certified check for the amount of the draft and was permitted upon so doing to take charge of the consignment, the carload of corn; that the corn having been damaged, the Cedar City Mills filed a bill in the Chancery Court, enjoining the collection of this certified check; that the corn was sold by the Clerk and Master, as receiver, and realized an amount about sufficient to pay the cost of the Chancery litigation and the freight on the car of corn, and that the failure of the defendant bank to protest the draft and notify the complainant bank at once released the Henderson Produce Company as endorser of this draft from liability to the complainant bank.

The bill charges that the action of the defendant bank in failing to use due diligence in presenting the draft and demanding payment thereof and in failing to obey instructions to protest for non-payment on presentation and

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failure to pay, and to give notice of the presentation and protest for non-payment to the drawer and endorser, caused the complainant to lose the amount of the draft and the protest fees thereon; that the defendant bank did not present the draft for payment, as it was instructed to do, but failed and omitted to present the same until December 14, 1911, and that this carelessness and negligence on the part of the defendant bank was wholly without excuse, as the place of business of the Cedar City Mills was in the same town and was within five minutes' walk of the defendant's banking house.

The prayer of the bill is for judgment and appropriate relief under the facts averred.

The defendant answered the bill and says: That it denies that the complainant is a corporation as alleged, and demands proof. It denies that the Henderson Produce Company shipped the carload of corn on the date averred, December 8, 1911, to the Cedar City Mills, or that it drew a draft on the Cedar City Mills or that said draft was attached as averred, and demands full proof. The defendant denies that the shipment was made "shipper's orders notified Cedar City Mills." It denies that any such instructions as alleged were ever received by it. It denies that the draft was sent to it on the date mentioned, and demands full proof. It denies that it received the draft as alleged on December 9, 1911, and denies that it held the draft until December 14, 1911, as alleged. It denies that the Cedar City Mills deposited with the Tennessee Central R. R. Co. a certified check for the amount of the draft on December 12, 1911. It denies that complainant sustained any loss because of any default on the part of the defendant, and denies that it failed or refused to protest the draft promptly upon its receipt, but, on the contrary, insists that it complied with the instructions imme-

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diately upon receipt of the draft; that the draft was protested the day it was received, and as soon after it was received as it could possibly present it for payment. It denies that it was guilty of any carelessness or negligence in the premises and denies all the allegations of the bill.

Proof was taken in the case under the issues thus raised by the bill and answer, and the cause was finally heard by the Chancellor on October 23, 1915, when he pronounced the following decree therein:

"This cause coming on to be heard before the Hon. J. W. Stout, Chancellor, upon the entire record, the original bill, answer of defendant, exhibits and proof in the cause from all of which it appears to the Court that on December 8, 1911, the Henderson Produce Company of Henderson, Kentucky, shipped a carload of corn to the Cedar City Mills, at Lebanon, Tennessee, and drew a draft on said Cedar City Mills for three hundred and eighty-eight dollars and nine cents (\$388.09), with bill of lading attached and discounted, the said draft with the bill of lading attached to the complainant bank. The draft was enclosed by the complainant bank in a letter addressed to the American National Bank, at Lebanon, Tennessee, and mailed at Henderson, Kentucky, on the day the draft was drawn, December 8, 1911. On the 14th day of December, 1911, the defendant bank presented the draft to the drawee, the Cedar City Mills, for acceptance and payment. The drawee refused to accept or pay the draft, and the draft was protested. When the draft was enclosed to the defendant bank for collection there was a slip of paper attached to the draft, instructing the defendant bank to protest and telegraph the complainant bank, which forwarded the draft for collection, if the draft was not paid when presented. The draft was never paid and complainant bank charged the said draft back to the Henderson

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Produce Company, which had drawn it, the said Henderson Produce Company having a checking account with complainant bank. The Henderson Produce Company at that time owed the complainant bank a note of \$300, on which the complainant bank brought suit in the Courts of Kentucky, which suit was defended by the Henderson Produce Company and collection of the \$300 note resisted on the grounds that the complainant bank through its collecting agent, the American National Bank, was negligent in presenting the draft for payment, and in protesting the draft as directed by complainant bank, which defense was adjudged to be good in the Courts of Kentucky, and the Henderson Produce Company was successful in having the full amount of the draft declared a loss of the complainant bank and not of said Produce Company. This suit was then brought by the complainant, the Peoples' Savings Bank, of Henderson, Kentucky, to collect from the defendant, the American National Bank, the draft for which the complainant bank had been compelled to account to the Produce Company. It is well settled under our uniform Negotiable Instrument Law, which is Chap. 94, of the Acts of 1899, that a collecting bank must present a foreign bill or draft for acceptance and payment within a reasonable time. There is no proof in this record that this draft was presented for payment before December 14, 1911; there is no proof in this record as to the exact date on which the defendant bank received the said draft through the mails. The great weight of authority is that a letter mailed will, reach or did reach, its destination, and the person to whom it was addressed, unless there is proof that it did not reach its destination and thereupon to whom it was addressed, in due course of mail. The proof in the record shows that in the due course of the mails a letter addressed at Henderson, Ky., on the

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8th of December, 1911, or any other month, would reach Lebanon, Tenn., on the next day, the burden of the proof is on the party to whom the letter was addressed to show that the letter did not reach its destination, therefore, if the letter containing the draft reached the defendant, the collecting bank on December 9, 1911, and the draft was not presented for acceptance and payment until December 14, 1911, the defendant bank was guilty of such negligence as renders the collecting bank liable to the forwarding bank for any damages or injury that it may have sustained by reason of the neglect or delay on the part of the defendant, the collecting bank, hence the complainant bank is entitled to a decree for the amount of said draft with interest from December 14, 1911, protest fees and the cost of this suit.

It is therefore ordered, adjudged and decreed that the complainant have and recover of the defendant the sum of four hundred and seventy-seven dollars and ninety-three cents, the amount of said draft with interest, and also the protest fees, amounting to two dollars and fifty cents, and all the cost of this suit, for which let execution issue. From which said decree the defendant prays an appeal to the next term of the Court of Civil Appeals, at Nashville, Tennessee, which appeal is granted upon defendant giving bond and the defendant is allowed until November 23, 1915, in which to file said bond."

And the defendant bank has perfected its appeal to this Court, and has assigned errors, five in number, thereto, that is, to the Chancellor's decree.

The facts of the case are that on December 8, 1911, the Henderson Produce Company, of Henderson, Kentucky, shipped to the Cedar City Mills, at Lebanon, Tennessee, a carload of corn, the shipment being routed via Hopkinsville over the Tennessee Central Railroad, in I. C. car

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No. 23903. This shipment reached its destination, Lebanon, Tennessee, at eight o'clock p.m., December 11, 1911, and was placed upon the siding of the Cedar City Mills either upon 12th, 13th or 14th day of December, 1911.

At the time that this shipment was made the shipper, Henderson Produce Company, made a draft for \$388.09, the purchase price of the consignment, in the following words:

"HENDERSON, Ky., December 8, 1911. No. 212.

"Pay to the order of Henderson Produce Co.,
Three Hundred Eighty Eight and 09/100 Dollars
and charge to the account of

"HENDERSON PRODUCE CO.

"By GEO. SMITH, *Mgr.*

"*To Cedar City Mills, Lebanon, Tenn.*"

And there was attached to that draft a slip in the following words:

"Protest and *telegraph* if not paid when presented.

"PEOPLES' SAVINGS BANK,

"*Henderson, Ky.*"

The bill of lading was likewise attached to the draft. This draft with the instruction slip thereto attached and the bill of lading was received by the American National Bank at Lebanon, the defendant in this case, on the morning of December 9, 1911. On December 14th, by some means the consignee, the Cedar City Mills, secured access to the car loaded with the corn constituting the consignment in question and opened same for the purpose of examining the shipment, with the view of ascertaining its condition. Just how that access was secured in the absence of the bill of lading, which was in the possession

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of the defendant bank, it having accompanied the draft forwarded by the complainant bank, is not clear, but having gained access to it and having opened the car and having declined to accept the consignment by reason of the defective condition of the corn as alleged by the consignee, and in order to avoid bringing any reproach upon the agent of the Tennessee Central R.R., it gave to the agent of the road its check for the amount of the consignment, certified to, be held by the road as indemnity against any claim that might be asserted or adjudged against the railroad concerning the consignment.

The Henderson Produce Company, the corporation making this draft, sold or discounted same to the complainant Peoples' Saving Bank on the day the consignment was made, and immediately upon its acquisition of the draft by discount thereof and endorsement of the Henderson Produce Company, the complainant, Peoples' Savings Bank, mailed same to the American National Bank with instructions and accompanied by the bill of lading as herein before stated and this draft with the instruction slip attached and the bill of lading was received by the American National Bank, as this Court finds as fact, on the morning of December 9, 1911, and was not presented for payment until December 14, 1911, three days after it came into the possession of the defendant bank.

As matter of fact, under the record disclosures the draft was never presented by the defendant bank to the Cedar City Mills except by telephone communication. This seems to have been done by one of the officials of the defendant bank and payment having been refused, another official of the bank, a notary public, then protested the draft for non-payment. We state these facts incidentally without passing upon the question of the validity or invalidity of protest made in this way, it not being essential

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so to do in the view the Court takes of the case. Upon being protested in this way, the defendant returned the draft to the complainant bank, mailing it on the evening of December 14, 1911, and it was received by the complainant bank on December 15, 1911. It should be further stated in order to a right apprehension of the facts that the Henderson Produce Company, the drawer of this draft who had discounted same to the complainant, Peoples' Savings Bank, was a patron of that bank. The bank had credited the proceeds of this draft to the account of the Henderson Produce Company, the endorser of the draft, and insisted that the endorser was liable to it for the amount of the proceeds so placed to its credit in the bank. The Henderson Produce Company denied liability, and declined to pay, asserting its release from liability by reason of the carelessness and negligence of the Peoples' Savings Bank through its chosen agency, the American National Bank, in failing to present promptly and protest promptly the draft in question according to special instruction given. The result of the litigation between the two Kentucky corporations, the consignor of the shipment, the Henderson Produce Company, and drawer of the draft, and the Peoples' Savings Bank, who discounted the draft and forwarded same to the American National Bank, was that the Henderson Produce Company was held not liable, and released from liability as endorser of the draft because of the delay and negligence in presentment and protest of the draft, and as a result the complainant, Peoples' Savings Bank, lost the \$388.09 that it had credited to the account of the Henderson Produce Company. This litigation between the Henderson Produce Company and the Peoples' Saving Bank was concluded about August or September, 1913, and the bill in this case was filed the following spring, April 1, 1914.

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Under the facts the question this Court is called upon to determine is whether or not the Chancellor was right in his conclusion reached in holding the defendant, American National Bank, liable for the amount of this draft.

While there are five assignments of error there is really but one question involved in the case, and that is the question whether or not the defendant bank was guilty of such negligence in its delay in the presentment and protest of this draft as renders it liable to the complainant bank for the amount thereof.

Under sub-section 2 of section 7 of the Negotiable Instrument Law, it is provided that an instrument is payable on demand where no time for payment is expressed or designated on the face of the instrument. By section 59 of the same law, the Negotiable Instrument Law, it is provided that every holder is deemed *prima facie* to be the holder in due course. Under section 81 of this Act it is provided that delay in making presentments for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct or negligence, and by point of reasoning the delay is not otherwise excused or excusable.

It should be noted that the defendant bank in its answer makes a general denial to every averment made in the bill, denying its receipt of the draft and every other allegation. Just why this character of answer should have been filed it is not material to inquire into, because no question is made of the fact in proof, but that it did receive the draft for collection. It is unable to state clearly and positively when it received it and just what steps were taken by it by reason of the fact that its records seem to have been destroyed or rendered unavailable for use as a result of some flood disaster. Perhaps it may experience some further difficulty in the fact that one of its officials who had

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charge of its affairs at the time of the occurrence out of which the law suit arises, has since died, and it could not have the benefit of his proof. Its real contention in the case is that it is not liable because it says that its custom with respect to drafts of the character of the one in question was to present the draft on receipt and it, the party on whom the draft was drawn requested that the draft be held for the arrival of the goods of which it covered the cost price, the forwarding bank was then notified that the draft was presented and that it is held until the arrival of the goods, unless contrary instructions are received from the forwarding bank and the custom is for the forwarding bank to advise them whether the draft is to be held until the arrival of the goods and then presented again or not, but clearly under the facts of this case it did not follow this custom.

The construction placed by the defendant on the slip accompanying the draft in these words, "protest and telegraph if not paid when presented," is that it was never purposed that the presentment and protest should be made upon receipt of the draft, but that the usual custom should prevail, allowing the opportunity for inspection of the consignment and determination of whether payment should be made on demand or the draft protested, and that the usual custom obtaining in such matters was observed in this instance and that therefore there is no liability.

The Court does not construe the instructions in that way, but with this draft in the form it is and with these specific instructions accompanying the draft and with the bill of lading attached, it is manifest to the mind of the Court that the purpose and intention of the consignor as well as the complainant bank, the owner of the draft by discount, that this draft should be presented along with the bill of lading upon its receipt and payment thereof

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demanded, and that no inspection should be allowed before payment, because the bill of lading was attached to the draft and forwarded with it.

It is apparent that the purpose in doing so was to secure payment in exchange for the delivery of the bill of lading authorizing the taking over by the consignee of the shipment. The custom prevailing in respect to the handling of collections by banks, especially the collection covering drafts is binding upon any party transmitting a collection to the bank who is cognizant of and familiar with such customs, but this rule cannot be extended beyond those who are familiar with such customs except as such customs are conformable to and in consonance with the usual and ordinary and general customs obtaining. In other words, any special custom obtaining in any special bank outside of the usual and ordinary customs obtaining in banks generally are not binding upon parties unless such unusual extraordinary customs are known. Under the instructions accompanying this draft it was the duty of the defendant bank to present the draft for payment upon receipt thereof or certainly within twenty-four hours after receipt thereof, there being no particular circumstance shown in the case why longer time should have been extended for presentment and demand. It held the draft for three days without presentment, demand or protest and until the evening of the third day, when upon presentment in the manner stated above, payment was refused, and it protested the draft in the way hereinbefore stated, for non-payment, and as a result of this delay in presentment, demand and protest, and in not following the instructions, and as a result of this negligence the complainant having lost the amount of the draft, we think the Chancellor was entirely correct in his holding in the case in awarding judgment.

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The authorities cited and relied upon in behalf of appellant in so far as they are applicable to the facts of this case are not in conflict with this holding, but, on the contrary, are in accord. The assignments of error are overruled and the decree of the Chancellor is affirmed with cost.

J. R. WILSON v. C. P. FAW.

Substantially affirmed by the Supreme Court at
Knoxville, 1916.

1. **BOOK DEBT LAW.** *Reliance upon other testimony. Limitation of action under.*

Where a plaintiff in suing upon an account testifies that he delivered the goods recorded in his book of accounts, and that the entries were simultaneously made and are correct, but does not make any effort to comply with the requirements of the book debt law, his action will be treated as one in account or *indebitates assumpsit*, and not under the book debt law; and the two-year limitation therein will not be held to apply.

2. **LIMITATION OF ACTIONS.** *Mutual accounts. What are. Money advancement with credits for goods.*

An account for monies advanced in differing sums for several years with credit for goods bought and labor done, is a mutual one. And mutuality is not destroyed with respect to one item by its being shown that it was a balanced or stated account more than six years old.

FROM WASHINGTON COUNTY.

Appeal in error from the Circuit Court of Washington County. DANA HARMON, Judge.

Wilson v. Faw.

JAMES B. COX for Plaintiff in Error.

GARDNER & BARLOW for Defendant in Error.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

-FAW sued Wilson on an account aggregating \$81.96. The Circuit Judge rendered judgment for this amount, and Wilson has appealed and assigned errors. We shall consider first that assignment to the effect that there is no evidence to support the judgment.

It is urged that there is no evidence in the record other than a certain book account which was objected to, and should have been excluded, and that the Court had no warrant for granting a recovery. It is our duty to take the most favorable view of the testimony that may arise in support of the plaintiff's claim; and we must affirm the judgment if there is any theory upon the competent testimony upon which plaintiff may recover: *Brooks v. Paper Co.*, 10 Pick., 701.

There were only two witnesses, the plaintiff below and the defendant. Plaintiff Faw produced his book of accounts and stated that defendant was indebted to him as shown thereby. There was no attempt by him to prove that the entries had been made by him or that they were correct. If this had been all, there would be grave doubt as to whether there had been adduced any material evidence upon which a judgment could be based. But upon re-examination, or upon being recalled, Faw testified that his books were correct, that all credits had been given, that he had made proper entries, that he had advanced to the defendant all the sums of money which were charged on the account, and that the defendant owed him the sums shown by the book. Defendant Wilson virtually admitted

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that he had an account with Faw and had been paid different sums and was entitled to proper credits, but claimed that he was entitled to a set-off of \$100.

It is clear that the foregoing embraces material evidence upon which the Court could found a judgment in favor of Faw. This evidence was such as tended to show or warrant the conclusion that Wilson had been advanced the several sums of money charged against him and had been given all credits of trunks which had been made by him, and that these entries were made by Faw contemporaneously with the several transactions, and that Wilson was indebted to the amount shown. We overrule the fifth assignment of error, and proceed to treat in connection therewith the fourth assignment, which is to the effect that the Court erred in not holding that Wilson was entitled to a set-off of some hundred dollars as damages for breach of an alleged contract whereby Faw had agreed to give Wilson employment as trunk manufacturer. The evidence upon this feature was conflicting, and there was thus presented an issue of fact upon which the finding with supporting testimony was against Wilson. This is conclusive upon us and necessitates the overruling of the fourth assignment of error.

The first assignment of error is too general and will be disregarded. In the second assignment it is insisted that the Court was in error in admitting the testimony of Faw as to the book account and in entering judgment thereon, because the account had accrued more than two years before suit was brought. While this assignment is not as full as our rules require, we have decided to waive this matter and to treat of the substantial question presented.

This question arose upon the plea of Wilson that the account was a book account and more than two years old,

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and therefore not collectible; and this plea was followed by an objection made to the introduction of the book at the time Faw was being examined as a witness. The last item upon the account was entered in 1910, some five years before this action was started, and if the book debt law should be literally applied plaintiff below will have to be denied a recovery. But the record fails to disclose any effort by plaintiff to pursue the book debt statute: Shannon's Code, 5562, wherein it is provided that a plaintiff may prove his account by a supplementary oath to the effect that he had no other means of proving his account, that the goods were actually delivered, that all credits had been given and that the defendant justly owed the balance: *Haley v. McPherson*, 3 Humph., 704. Instead of so doing, plaintiff, on re-examination, swore that he had made the deliveries or payments of money charged, and had himself entered proper credits, but without any declaration that the account was his only proof. He stated that the book was the only means by which he could establish the *amount*, and this is quite different from a statement that his account book was the only means of proving payment.

It is well to recite that the sole objection made in the lower Court was that the account book was inadmissible because it covered transactions more than two years old, and was rendered incompetent by the statute aforesaid. It was not urged that the account was not regularly nor accurately kept. Hence, the presumption must be that Faw did keep the account according to the custom, that is, contemporaneously and correctly.

We have carefully examined all the old authorities with reference to the book debt law and have looked into many recent adjudications and comments upon this archaic statute. A singular thing brought out by this examination

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is that there is not to our knowledge a single case in Tennessee dealing with the question since the passage of the statute removing from suitors the disability of interest. The last reported case seems to be that of *Forsee v. Matlock*, 7 Heisk., 421. This nonuser affords a cogent basis for the assumption that after parties were permitted to become witnesses the book debt statute fell into *quasi desuetude*. It is not necessary to decide, nor probably should we so hold, that the statute was repealed or no longer available. We can conceive of cases where it may yet be resorted to by way of necessity. But we do decide that when a plaintiff takes the stand in a case upon account he may corroborate his testimony by proving the account he has contemporaneously kept, and that when this is done, plaintiff is proceeding in assumpsit or upon the action of account and not under the book debt law: 1 C. J., 670; 10 Ruling Cases, p. 1171; 4 Chamberlayne's Evidence, sections 3059, 3051, 3062, 3068; see, also, 52 L. R. A., 566. A sound maxim, a Cokean expression, is that when the reason of a rule ceases the rule itself ceases. It is universally known that the book debt law was passed to enable merchants to collect small accounts by producing their books, and this notwithstanding the law prohibiting parties from testifying. Now, when interest is not a disqualification a plaintiff may testify unrestrictedly as to matters connected with the lawsuit and may support his testimony by all circumstances importing credibility, such as simultaneous entries and presumptions of regularity. See authorities above. When such is the case he brings his suit upon other bases than those afforded by the account book. Consequently the restrictions as to time and amount imposed by the book debt law are eliminated.

After a careful consideration of this question we have reached the conclusion that defendant cannot stand upon

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the limitations in the book debt law. We overrule the second assignment of error.

In the third assignment it is insisted that the Court was in error in holding that this was a mutual account, and that the statute of limitations of six years was not a bar to several items which were more than six years old. Plaintiff below testified that this was a mutual account. This was not controverted by Wilson. No other conclusion can be arrived at after inspecting the account. Hence, the Court was not in error in treating this as a mutual account such as would save all the items from the bar of the statute, the last entry being within six years. Something was said by learned counsel about striking out the first item of \$25.64 for the reason that it was more than six years old and was the mere balance of an account stated, and thus a mere debt and not an item of account. But it is found to be an item entered as upon account and must be treated as such.

We overrule all assignments of error and affirm the judgment of the lower Court with costs.

Stout v. Kernell.

SARAH J. STOUT v. W. R. KERNELL ET AL.

Certiorari denied by Supreme Court, 1916.

1. PRINCIPAL AND AGENT. *Fraud of latter in negotiating trade adopted by former.*

The principal is chargeable with the consequences of a fraud committed by his agent in consummating a trade desired by the principal.

2. SAME. *Fraud committed by agent of both parties.*

Where a person is acting as agent of both parties, but agency with respect to one is concealed, and consummates a deal whereby financial loss results, the opposite party will be held liable upon the ground that it was a fraud upon the other to conceal the fact of joint or mutual agency.

3. INNOCENT PURCHASER. *Members of Partnership. Knowledge possessed by one member.*

A partnership dealing in real estate cannot rely upon the plea of innocent purchaser where one member of the conveyee firm had knowledge of an outstanding interest or equity in the land.

FROM LAWRENCE COUNTY.

Appealed from the Chancery Court of Lawrence County.

R. B. WILLIAMS for Complainant.

J. H. MORRISON for Defendants.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

COMPLAINANT filed this bill against the defendants, Kernell, George, Brewer, Held & Company, and one K.

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Lee, for the purpose of having a certain conveyance of lands which she had made by deed to Brown set aside because of fraud in its procurement, and to have the land restored to her. The Chancellor dismissed her bill, and she has appealed and assigned sufficient errors to open up for consideration every phase of the case.

After careful consideration of this record, we have reached the conclusion that the learned Chancellor, usually eminently correct in his conclusions, was in error with respect to the rights of complainant. We are convinced that she was the victim of a gross fraud, and that nothing stands in the way of granting her full relief.

The land conveyed by her consisted of some one hundred and forty acres lying in Lawrence County. It is variously estimated as worth from \$250 to \$500. But this is not material. For it suffices that the land was of some value, whereas the note or property which she got in exchange was absolutely worthless. The recited consideration was \$500, but it consisted of a \$500 note, executed by one Hudson and wife, to some party, and was a second lien upon a parcel of land lying in Illinois. That is to say, there was an incumbrance of some \$6,000 upon the Illinois property that was superior to a \$1,000 mortgage or lien, one-half of which was evidenced by the note which had been endorsed and traded to Mrs. Stout, there being two notes of like amount. These two notes had been endorsed by the payee without recourse to defendants, Brewer and George, who in turn endorsed it without recourse to Mrs. Stout in full payment for the land.

One conclusion of fact which is indisputable is that defendant Kernell was the agent of both Mrs. Stout and George and Brewer in the making of the trade. This may not be conceded by appellees, but it is beyond controversy

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that Kernell was acting as agent of the purchasers in carrying on negotiations with Mrs. Stout, and this without her knowledge. The contention of George and Brewer that Kernell was solely the agent of Mrs. Stout is too thin to be spread upon paper. The facts to the contrary cannot be assailed. And whether he be treated as the joint agent of the parties or as the agent of George and Brewer, the fraud perpetrated by him must be held to have vitiated the transaction with Mrs. Stout.

George and Brewer were in possession of the two notes above described and they were of course eager to trade them. They were anxious to procure some land such as that owned by Mrs. Stout, and requested Kernell to make inquiry for such, with the assurance that if a good trade was secured he would be compensated. Immediately in connection with this engagement with Kernell, Brewer told him that he desired to trade the paper in question. This authorized Kernell to make a trade and to use the paper as the inducement and means of payment, and the legal consequence must be that George and Brewer are bound by every representation made by Kernell in negotiating the exchange of the note for the land.

Kernell shamefully misled Mrs. Stout, who is poor, illiterate and easily imposed upon, and who at the time of the trade was to the knowledge of Kernell exceedingly anxious to turn the little land in question into money. We find that Kernell took her to Lawrenceburg and made numerous false representations as to the value of the note in question, and otherwise deceived her, misled her, and kept her in the dark as to the truth of the transaction. We are also of the opinion that he importuned Mrs. Stout to sign the deed, and overcame her doubts as to the value of the note, all the time acting for and in the interest of George and Brewer, while she considered him her friend,

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neighbor and agent. These parties must be treated as having violated the rule against using another's instrumentalities without consent.

As before stated, the note in question was valueless. The land was sold under a first mortgage and brought just enough to satisfy that prior indebtedness. This is demonstrable that the note was worthless. It is said that the land was worth largely in excess of that, but in so far as complainant was concerned the result would have been the same had the first mortgage indebtedness been smaller. It is also urged that Mrs. Stout could have impounded the rents of the Illinois place during the year 1912. This could not have been done in Tennessee by a second mortgagee, and we are not shown any Illinois statute which justified any such procedure in that State. It is urged that Mrs. was guilty of negligence or that her agent was and that because of this she lost. We are of opinion that nothing would have availed Mrs. Stout by any sort of diligence which the defendants might have expected her to show.

But above all this we find that Kernell made Mrs. Stout believe that the note in question was as good as the cash, and that she could get the money upon it at any bank and at any time; and we are persuaded that it was this representation which mainly induced her to consummate the trade. We cannot refrain from the observation that this was more than a mistake of judgment, and that the representation was made with knowledge of its falsity or in the absence of knowledge which would suggest the contrary, and that as a consequence the transaction should be rescinded as fraudulent.

We see nothing in the alleged contentions as to innocent purchasers to interfere with the granting of relief. It is true that the original transaction was negotiated

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through Brewer and the deed was made to George. But both were interested, and Brewer acted as agent of George as much as for himself. If George adopted the contract of Brewer he also adopted any frauds perpetrated by Brewer or by Kernell, their common agent. Besides, we are persuaded that the placing of the title in George was one means of embarrassing Mrs. Stout. We do not accept the explanation of this feature of the transaction, or at least we do not give it that construction which appellees advance.

It is possibly true that George executed a conveyance or an instrument to Held & Co. But he was a partner of this firm and must be treated as fully cognizant of all the facts of the previous transaction. In other words, knowledge of the fraud of Brewer and Kernell must be imputed to him as of the day of Mrs. Stout's conveyance; and likewise must he be charged with this knowledge as the active member of the firm of Held & Company. It is also our observation that Held & Company filed no answer, but relied upon George to defend for them. In such case the plea of innocent purchaser cannot avail the partnership.

With respect to K. Lee, to whom an alleged conveyance was made, it suffices to say that it is reasonably well established that there was no such person in existence. Complainant interrogated a witness to this effect and thus brought home to defendants her contention that this K. Lee was a fictitious personage; and yet defendants made no effort to establish the contrary.

It results from the foregoing that complainant is to be decreed a right to rescind her trade and recover her lands, and to have all contrary conveyances held as clouds upon her title. She will, of course, deliver up to the Clerk and Master the note of defendants George and Brewer.

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We wish in conclusion to call attention to a line of authorities to the effect that where a person acts as agent for both parties without the knowledge of the defrauded one, the latter may avoid the transaction upon the ground of public policy. The law denies the other party the benefits of a transaction so tainted with fraud: *Horner v. Spencer*, 17 L. R. A. (N. S.), 622.

Defendants will pay the costs.

CHAS. C. HUX AND WIFE V. RUSSELL.

Affirmed by Supreme Court as to Russell, 1917.

ESTATES BY ENTIRETIES. *Damages wrongfully inflicted during joint life of husband and wife are recoverable by the surviving spouse.*

Where damages were wrongfully done to real estate vested in husband and wife as tenants by the entirety, both at the time the claim of damages arose and at the time of the death of the husband, the money subsequently recovered or paid in settlement for such damages must be viewed as impressed with the character of real estate, and, therefore, as the property of the surviving wife. Such damages cannot be viewed as a claim arising rightfully and by consent of all parties out of the property, such as purchase money or money due for rents, etc. This view works equitable results pointed out in this case, but not made the basis of the decision.

FROM CAMPBELL COUNTY.

Appealed from the Chancery Court of Campbell County.
HUGH KYLE, Chancellor.

Hux v. Russell.

ROY JOHNSON for Hux.

W. A. OWENS and J. N. RUSSELL for Defendants.

MR. JUSTICE HUGHES delivered the opinion of the Court.

THIS suit was brought by and on behalf of the heirs at law of one Martin A. Fine, who died in July, 1908, a citizen of Campbell County, and has for its object the collection of certain moneys recovered in or paid in settlement of an action brought by Martin A. Fine in his life time, but paid after his death, the suit here being based apparently on the theory that the money collected or paid in that action became impressed with the character of realty, the recovery being for damages to real estate; and therefore on the death of Martin A. Fine passed to his heirs at law, just as if at that time realty, although the bill in another of its phases treats the money as if properly going into the hands of an administrator as if personalty. In other words, the suit is brought by and on behalf of complainants as heirs at law of Martin A. Fine, deceased, alleging that Fine in his life time brought suit against the Southern Railway Company to recover damages for injuries to real estate, but that, pending that suit and before any recovery or payment of money therein Fine died, and that another, one A. J. Carr, was appointed administrator of his estate, which other, according to the allegations of the bill, failed to collect and properly account for what should have been collected by him as a result of that suit, the suit having been settled after the death of Martin A. Fine, thus apparently treating the recovery as personalty in the hands of the administrator, or which should have gone into his hands; but this action, as indicated, is by the heirs at law of Martin A. Fine,

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and the allegations are that the money paid in settlement of the suit brought by Fine was paid to the defendant J. N. Russell and that Russell had accounted for the proceeds thereof by paying it in part to the widow of Martin A. Fine, thus wrongfully, as the bill alleges, distributing it, in that view of the case treating the money paid in settlement of the suit brought by Martin A. Fine as being impressed with the character of real estate that passed to the heirs of Fine, the heirs at law clearly seeking to recover the money because it represented and stood in the place of the realty, because the title to the realty passed to the widow on the death of Fine, it being in the husband and wife as tenants by the entirety in his lifetime. In any event, the bill charges that \$500 as the result of the settlement of the suit brought by Fine in his life time, went into the hands of the defendant Russell, and that Russell had failed to account therefor, and seeks to recover for and on behalf of the heirs at law of Martin A. Fine the full amount thereof; the allegations of the bill being that he had wrongfully failed to account for and pay over the money, and thereby had subjected himself to statutory penalties.

The widow of Martin A. Fine, deceased, and certain other defendants answered the bill, setting up certain defenses, among which the widow pleaded that the money paid in settlement of the suit which had been brought by her husband was for damages to realty, the title to which was in her and her husband as tenants by the entirety, and that on her husband's death she as the surviving spouse became vested with the legal title to the property, thus evidently treating the money which had been paid in settlement of the suit as between her and the administrator as impressed with the character of realty.

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J. N. Russell, Esq., one of the attorneys representing the husband in the suit which he had brought to recover damages to the realty, received the \$500 paid by the railroad company in settlement of the claim for damages, and it is disclosed that he, after deducting his fee and the fee of counsel associated with him in that case, paid to the creditors of the widow, either on her order or otherwise, all the balance of that collection, apparently regarding the money as justly payable to the widow as the surviving spouse; and he pleaded by way of defense to this action against him seeking to hold him liable for the money that was paid into his hands, that the widow set up her claim as surviving spouse, and also pleaded that she had incurred considerable indebtedness for food and clothing for the parties who are now seeking the money as heirs at law of Martin A. Fine, deceased, setting out that when the money was paid to her they were making their home with her, as they had been prior thereto, and that he, Russell, had disbursed all the money, after deducting the fees due counsel, in payment of such claims, except the small sum of \$8.00, setting up and showing to whom the payments had been made.

The parties entered into an agreement as to some of the material facts in the case, and took two depositions, on which agreement and depositions the issues were tried, the trial resulting in a decree against Russell in the sum of \$296.89, that being the amount held to have been erroneously paid out by him with interest thereon. From that action of the Court defendant Russell and others prayed an appeal to this Court, and have here assigned errors.

That the money was all disbursed by Russell and therefore did not go into the hands of Carr, the administrator of the estate of Fine, is established by the agreement of

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the parties. It is also shown in the record without question that the title to the real estate for damages to which the money was paid in settlement of the suit brought by Fine in his life time, was vested in Martin A. Fine and wife, Mattie Fine. Neither the extent nor character of the damages is shown except that one witness testifies that the claim was for injuries to a certain brick house, inflicted by an explosion of a car of dynamite or other high explosive, commonly known as the "Jellico Explosion." And, although it is pleaded in one of the answers that Martin A. Fine had in his life time sold and transferred the realty, there is nothing to show that such was a fact, so that we must treat the claim for damages as having arisen out of damages to realty, the title to which was vested in Martin A. Fine and wife as tenants by the entirety, both at the time the claim for damages arose and at the time of the death of Martin A. Fine. And, although the evidence is not clear as to the manner in which the damages were inflicted, this Court must accept the view that they were wrongfully inflicted, and not as a claim arising rightfully and by consent of all parties out of the property, such as purchase money or money due for rents, etc.

Viewing the subject matter of this suit in this light, what are the rights of the parties?

The husband and wife holding the title to the property as tenants by the entirety did not by contract or other voluntary act part with their title to the property, but whatever loss was sustained was the result of the wrongs of another or others. This being true, we are of the opinion that the money paid in settlement of the claim for damages cannot be regarded as if it had been paid on a contract for the sale of the property or for its rental, which view we take for the reason that if the husband

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himself or a third party could, by torts committed on and against the property held by husband and wife as tenants by the entirety, lessen or destroy its value, then to the extent to which thus injured the property would be taken from one of the two tenants wrongfully and without the consent of that tenant, and if that could be done it follows that by the wrong of the husband himself or the wrong of a third party the realty might be destroyed or rendered entirely worthless, and then the husband by converting to his own use the claim for the property he could take from his wife, one of the tenants by the entirety, her interest in the property. This view of the situation but shows (and attention is called to it for the purpose of showing), that the rights of the parties can best be served by viewing the money collected for such damages, *as between the husband and wife*, as impressed with the character of real estate; and, to the extent that this action so views the case, we are of opinion that it takes the correct view. But the further pursuit of that conception of the case destroys the rights of complainant in the instant case. If the property, or the proceeds of it, representing the injury to it, is to be viewed as realty instead of personalty, then the husband would have no more right to convert it to his own use than he had to convert the realty itself to his use, and it would follow that the money paid in satisfaction of the claim for damages, being impressed with the character of realty, would become the property of the surviving spouse on the death of the other one. So it is, in that view of the case, after Martin A. Fine died, the sum of \$500 paid in settlement of the claim for damages to real estate, being impressed with the character of real estate, passed to his surviving wife. This view of the case we regard as not only one that would protect the rights of the wife ordinarily, as already pointed

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out herein, but a view that works equitable results in the instant case.

As already herein pointed out, the sum of \$242.64, with its interest, was paid out by the defendant Russell in satisfaction of a claim or claims that had arisen for supplies furnished to the family at a time or times when some or all of the parties now seeking to recover the money were members thereof, and when the family were in destitute circumstances. To permit the children of Martin A. Fine, deceased, to be parties to the use of the money at a time they were members of the family of the widow when the family was in destitute circumstances, and then thereafter to recover the whole amount, or we might say add any part of it, would be to permit a course that would not work equitable results, whatever their view of the situation might be. We might here say further that the stipulation entered into by counsel for the parties in this cause, which it is shown was done for the purpose of saving costs, recites that not only this one payment was made by Mr. Russell, which inured to the benefit of the family, but it is shown that he made other disbursements for the benefit of the family, one of \$15 for clothes for the children, and one of \$18 for Mrs. Fine "to move out," which would indicate that it was for the family use, thus showing that he, in fact, disbursed more money for the benefit of the family than was really subject to disbursement, after deducting his fee and the fee of his associate counsel.

Another view of this situation is that, while it is not in so many words disclosed, it appears with reasonable and moral certainty that if the money which forms the subject matter of this litigation is to be regarded as personality left by the husband at his death, then Mrs. Fine would have been entitled to a year's support out of any

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other property appears as an almost certainty. This, however, is mentioned only as entering into the moral consideration.

So it is, viewing this case as presenting the question of right of the wife or the widow of Martin A. Fine to claim the money paid to defendant Russell as impressed with the character of realty, a view clearly taken of it by complainants, and the one of which their claim is presented to this Court, as well as one which works out the equities of the parties, and therefore a sound one in the instant case, we are of opinion that the decree of the Chancellor was and is erroneous, and that it should be reversed and the suit dismissed at the cost of complainants; and a decree will be entered here to that effect.

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SAM CHUNN v. MEMPHIS FLOORING CO.

Affirmed by Supreme Court, 1917.

(See note at end.)

1. **INDEPENDENT CONTRACTOR.** *Relation not to be determined solely by wording of contract.*

Where the defense of independent contractor is urged the relation is not to be decided solely upon the terms of the contract, but by the situation and subsequent conduct of parties. Merely denominating one an independent contractor does not make him so.

2. **SAME.** *Things to be considered in determining. Omission of customary provisions.*

In determining whether the relation exists it is essential that the nature of the work, the previous relations of the parties, the omission from the contract of customary provisions, and retention of control of premises and many other considerations should be brought into view.

3. **SAME.** *Mere superintendent is not.*

A man employed merely to superintend an improvement is not an independent contractor, although he engages the laborers and fixes their compensation and is charged with materials used, if it be made to appear that his employer retained the right to control him as to detail and method.

4. **SAME.** *Supreme tests as to relation.*

Two tests of prime importance are: 1. Whose will and wishes did the man give expression to by detail and method, his own or those of his principal? And, 2. Did or did not the principal reserve the *right* to control the actions of the contractor? In other words, for whom was he working?

5. **SAME.** *Burden of proof base of doubt resolved in servant's favor.*

Where a landowner is having work, especially remodeling, done upon his premises, the burden is upon him to show

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that the work was done by an independent contractor if he relies upon that defense to an action for personal injuries brought by one employed to assist. And in case of doubt as to the relation the doubt should be resolved in favor of the injured servant.

6. SAME. *Master and servant estoppel to deny relation.*

A party may by his conduct toward another estop himself to deny the relation of master and servant, as by conduct reasonably calculated to give origin to the belief that the relation exists.

7. PRACTICE IN APPELLATE COURT WHERE JUDGMENT NON OBSTANTE VEREDICTO REVERSED.

In case the action of the lower court in pronouncing judgment for defendant notwithstanding verdict is reversed, the proper practice is to remand the case with directions to pass upon motion for a new trial.

FROM SHELBY COUNTY.

Appeal in error from the Circuit Court of Shelby County, Part 3. T. B. PITTMAN, Judge.

CARUTHERS EWING and R. E. KING for Plaintiff in Error.

BROWN & ANDERSON for Defendant in Error.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

SAM CHUNN instituted this suit against the defendant in error, whom we shall call defendant, to recover damages for personal injuries claimed to have been sustained by him while in the service of the defendant as a carpenter. Among other defenses urged was that plaintiff was

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the servant of one Henson, to whom the work had been let as an independent contract, and that he was at no time an employee of the defendant. Another issue was raised upon the general plea of not guilty.

It was the conception of the learned counsel for both sides that the question as to whether Henson was an independent contractor was one of law for the Court; and it was agreed that this might be reserved for decision after rendition of a verdict by the jury upon the other issues in the case. The trial proceeded in due order, and the jury were charged with respect to all points except that of the relation between the plaintiff and the defendant. The verdict was that plaintiff was entitled to a recovery of \$7,000, provided it be decided that he was in the service of the defendant.

Upon the return of this verdict the defendant moved the Court for judgment notwithstanding the pronouncement of the jury, and the defendant also moved the Court for a new trial upon the issues that were submitted to the jury. Upon consideration of these matters the Court pronounced judgment for defendant *non obstante veredicto* and declined, or it may be that he omitted any disposition of the defendant's motion for a new trial upon the facts. Plaintiff excepted to the pronouncing of judgment in favor of the defendant and is here assigning errors.

The questions of practice arising upon the record are quite singular, and will have to be met in some way in disposing of the case. Our first observation is that this was one case in which the verdict of a jury upon the relation of the parties would have been eminently proper, especially upon two disputed phases suggested by the proof. One of these was as to whether or not the defendant, not-

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withstanding its arrangement with Henson, exercised some degree of control or had the right to control the method and detail of the work undertaken. The other question was as to whether the defendant so far conducted itself as to justify Chunn in the belief that he was in its service in such a way as to create an estoppel to deny the relationship. But it seems that the relationship of the parties was by express or implied consent to be determined by the Court.

We have given this case much thought, and have reached the conclusion that the learned Circuit Judge was in error in resolving this question of relationship in favor of the defendant. An extended and padded opinion could be written about this subject, but we deem this unnecessary, for the reason that this is one controversy that is peculiar in itself, and to which any tribunal to which it is submitted must exercise an independent and commonsense judgment. It is so absurd to obscure the points at issue by "quotations."

The record discloses the following state of facts, most of which are beyond any dispute, the remainder of which are established by the decided preponderance of the evidence. (We make reference to this matter of dispute for the reason that the greater portion of the briefs of both sides is taken up with controversies as to matters of fact):

The defendant is a flooring manufacturing company, owning and operating extensive mills and premises in the city of Memphis. In particular it owned or had in possession two buildings between which was an intervening space of some fifty feet. It was the desire of the company to fill in this space with a building, and to this end it invited the submission of propositions by contractors. These bids approximated \$1,800.00. Henson thereupon proposed

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to the company that it engage him to perform the work of construction according to specifications submitted by him calling for the expenditure of about \$1,400.00. This brought about negotiations between them and resulted in a contract or engagement whereby the defendant was to furnish the materials and keep the time of the laborers and to pay them, Henson hiring the laborers and furnishing the tools and doing the work under an effort to restrict the cost to \$1,400.00; and if Henson was successful in this respect he was to receive ten per cent for the amount of materials used and labor employed, with a stipulation or reservation that if the cost exceeded this \$1,400.00, the matter of Henson's compensation was to be adjusted by some new arrangement with the defendant's manager. The contract was oral.

We have carefully scrutinized this record for the purpose of ascertaining whether there was any reservation in the company of the right to control Henson with respect to the manner of the work or whether it was wholly committed to his dictation, with responsibility to the company for the result only. There is nothing expressed about either of these features, but the more probable inference is that a right of control with respect to some of the details was reserved to the defendant. But even admitting that the contract in *haec verba* gave the exclusive control to Henson, there is some evidence of a cogent nature tending to show that the company did exercise some directing power over Henson during the existence of the contract. This is gathered from the testimony of Humphreys, the general superintendent, and from Henson, both of whom admit the variation of the contract in some important particulars. But we repeat that the contract itself does not negative the right in the company to control the time and methods of work of Henson and the laborers under him.

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The record is also silent as to the costs of the material and the method of charging them to Henson; and there is nothing whatever to show in what way Henson was to pay or be charged with the materials to be used in scaffolding and other purposes. Nor is there anything said with reference to the time when the contract was to be completed, nor the day of payment, nor with respect to supervision by any other than Henson and final acceptance of the *result*, by some other representative than Henson. While these are not controlling, we consider them persuasive as negatives of an independent relation. For it is usual for concerns that let out contracts to an independent party to reserve the right of inspection and final acceptance or rejection.

Henson was given the authority, or exercised the authority, to employ underlings whose wages were to be fixed in accordance with the wishes of the company. This is vehemently disputed, but the preponderance of evidence is to the effect that he told both plaintiff and other witnesses that the defendant wished him to put a limit of thirty cents per hour upon the time of the carpenters. And it cannot be denied but that the defendant had an interest in the minimizing of the wages of the men at work under Henson, in view of Henson's admission, impliedly made it is true, that it was to the interest of both himself and the defendant to restrict the cost to about \$1,400.00, and that if the job did exceed that amount, the general manager would nevertheless pay him his percentage.

The work was carried on in such a manner as to be considered an addition to an older building, and not as a new structure. One result of the work was that some repairing and adjusting of the older buildings was necessary. In fact, some of this was not contemplated by the parties, and

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was yet done without any new arrangement upon the part of Henson and the company for additional compensation.

By an arrangement with the defendant the *total* time of all the men at work upon this building was kept by its bookkeeper, and the wages of these men were computed by this time or bookkeeper and put into a pay envelope of the defendant and were delivered to Henson, it is true, and then handed by him at stated periods to the employes. But these employes were furnished with time and identification cards bearing the name of the defendant as employer, and also some instructions to be observed by the laborers; and these laborers were required to use a stamping or registering machine for time-keeping purposes just as all other employes of the company did. In fact, it appears that with respect to entrance into and departure from the premises and demeanor while thereon, the laborers upon this particular job were expected to conduct themselves just as did the workers upon other parts of the defendant's premises. This is necessarily true, notwithstanding Henson's claim that he reported the time of the men at intervals and had entire control of them.

The time card, referred as having been given to Chunn and other employes purported on its face to be issued by the defendant company, and was in effect a statement in writing that the one whose name appeared thereon was an employe. Henson's explanation was that this was adopted by agreement with the general manager for convenience, and because he, Henson, did not possess suitable documents. We do not attach any weight to this explanation; and it cannot have any material bearing with respect to the matter of estoppel.

Upon the card possessed by Chunn there appeared his name as an employe of the defendant company. Chunn asserted over and over that he was at work for the com-

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pany, being employed by Henson for the latter. Co-workers also testified that they were laboring for the company, although engaged by Henson. The latter admitted he was fulfilling the same position toward the defendant that he occupied toward a Goodlander Company for whom he was a superintendent. Again, Henson is referred to a number of times as merely foreman of the work; and it was stated by Humphreys that Henson was *employed* to put up the building; and also that Henson was looking after this part of the work, while he had control of other parts of the enterprise. Another significant thing in connection with Humphreys is that immediately after Chunn was hurt the former was told of it, and at once went to the spot, as he felt it his duty to do.

Another and significant thing is that another person was employed to do the roofing of this building, thus demonstrating in our judgment that Henson was not responsible to the company for the entire work, but only for results from time to time as mere superintendent.

Able counsel for the defendant reiterates that Henson was not to be dictated to in any respect, but we fail to find the preponderance of the evidence to be that way. It is true that the company doubtless committed to him the employment of the hands and the fixing of the number, the selection of the tools and some of the incidents thereto; but the record is silent as to the committing to him of the sole direction of the work, with responsibility to the defendant for the completed job.

A long discussion of the cases is unnecessary. We shall nevertheless make reference to some of them.

It is not generally true that the wording of the contract always determines whether the builder is a contractor or a servant, as was remarked in the case of *Mohargo v. New-*

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comer, 117 Tenn., 603, especially when the contract is in parol and is meager in its provisions. In such case the rule announced in *Powell v. Construction Co.*, 88 Tenn., 697, is the better, namely, that not only the contract but all the surroundings, the objects and the subsequent conduct of the parties may turn out to be material in determining what was the real connection of the parties. This is emphasized in *Nelson v. Cement Co.*, 84 Kansas, 797, wherein it is observed that the Court will look to the substance of the contract and all the circumstances, and that the mere fact of *nominal* employment of an independent contractor will not relieve the master of liability where the servant is in fact in his employ. See also *Midgette v. Manufacturing Co.*, 150 N. C., 333.

It would be useless to pile up definition after definition of an independent contractor. The simplest and best one is that to be found in the Powell case as that of one who, exercising an independent employment, undertakes an enterprise for another according to his own will and dictation, being responsible to his employer for the completed job.

It may be yielded at once as settled in this State that the method of paying nor the paying of the servants, nor the furnishing of materials, nor reservation of a limited control will be sufficient to prevent an arrangement whereby the party doing the work is to be treated as an independent contractor. *Railroad v. Cheatham*, 118 Tenn., 160. But the authorities are uniform that the manner of paying the underservant, and the method of compensating the contractor, and the furnishing of materials by the employer and retention of even a limited control, are all material circumstances which may in connection with other facts justify the inference that the contractor is not independent of his employer.

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The burden is upon one who is having work done upon his premises in the course of which another is injured to show that he has committed the enterprise to an independent contractor. *Central Coal Co. v. Grider*, 65 K. R. A., 455; 14 R. C. L., 78; and this is also supported indirectly by the recent Tennessee case of *Davis v. Lumber Co.*, 126 Tenn., 577, 583.

The test is the right to control, for if there is reservation of the right to control the details of the work, it is immaterial whether this be exercised, for the reason that in the doing of any particular part of the work the contractor is representing the will of his employer; and this is the supreme test. For in order to make the party an independent contractor he must in no respect be representing the contractee with regard to details. 65 L. R. A., 447, 448. Again, a contractor who submits himself to the control of another as to the details of any job is not an independent performer.

We are of opinion that the reasonable deduction from this evidence is that Henson was subjected to and that he submitted himself in great manner and as to details to the defendant company. We are persuaded that the most logical inference from the testimony is that Henson was employed merely to superintend and nothing more, and was virtually in the situation of the foreman in the cases of *Rankel v. Buckstaff*, 20 L. R. A. N. S., 1180; *Railroad v. Henning*, 82 U. S., 649, and *Midgette v. Manufacturing Co.*, *supra*. With respect to the reasonableness of the inference of the right to control reserved to the defendant and to the merely supervisory character of Henson's employment the case of *Dane v. Chemical Co.*, 41 N. E., 678, is instructive, for the reason that in that case the absence of specifications and limitations as to time and other cir-

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cumstances were indicative of the reservation of the right to control.

We wish to emphasize this retention by the defendant of the right to control the operations of Henson, for the reason that if this conclusion be once reached all doubts must be resolved in favor of the plaintiff. For we repeat that it is immaterial whether the Flooring Company actually undertook to direct work; the real test is as to whether it had the right to control. We are of opinion that there was material evidence tending to show that the defendant ordered substantial changes or additions to the work from time to time, and if this be the fact, the right to control is the only inference. See 14 Ruling Case Law, pages 67 and 70.

A circumstance alluded to once before but worthy of repetition is the fact shown that defendant retained possession and control of the premises and undoubtedly had numerous other employes thereabouts, and that its general manager and superintendent were virtually present or accessible. See 14 Ruling Case Law, 70; 65 L. R. A., 459.

The observation made immediately above emphasizes the importance of the great question as to the one for whom the work was really being done; and this is to be responded to by looking to the nature of the entire transaction. Was Henson liable at all times for the *completed* job, and was he expected to be answerable for the desired result only, losing entirely if the work was never completed, or was he entitled to his wage at stated intervals, with reservation of the right in his employer to abandon the enterprise? Was he merely to answer the ultimate end desired, or was he accountable from time to time as to the methods of doing the work? If he was merely to *carry on* the work at different stages without any obligation to complete for a fixed

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price, there was no independency of employment. *Bailey v. Railroad*, 52 American Reports, 129.

Again, another test is as to whether Henson was *expected* to perform the work of superintendent in person, or was he given permission to perform through another? If not so allowed, then he was undoubtedly the servant of the defendant. For if he is unable to select another as an instrumentality through whom to do the work, he is not independent in his choice of means and methods. It cannot be disputed that the essence of the contract with Henson was that he personally superintend this work. Hence the demonstration in our opinion of his dependency upon his employer, and also demonstration of the fact that he was engaged merely to supervise a desired undertaking.

Before entirely leaving this subject we think it not amiss to refer to one or two other matters of fact that are cogent as tending to show that the company did reserve the right to control, and further of the right of the plaintiff to look to the defendant for responsibility: There is no evidence to the effect that Henson was a competent contractor other than that which might be inferred from experience, and he admits himself that his experience as a superintendent had to be resorted to as evidence with respect to his competency to contract. Again, there is no evidence as to his solvency and responsibility. While this latter circumstance may not be of great weight, it should be considered in every case where a wealthy party undertakes to escape liability upon the ground that he has committed the undertaking to an independent contractor.

We could stretch this opinion much further by quotations from authorities, but this is a case in which as we before said there should be some commonsense original views applied, an earnest endeavor to look at things as they really were and are. We are convinced that a candid

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examination of this record will bring to light more reasons for holding that Henson was the servant than that he was an independent contractor; and it goes without saying that in such case the proposition should be resolved in favor of the injured servant.

Especially should the question be determined favorably to the servant when the evidence upon which an estoppel urged by him is predicated is considered. It is not only allowable to consider this testimony as tending to show the grounds of an estoppel, but as corroborating all the other evidence to the effect that Henson was in fact merely a superintendent.

We shall proceed to notice the evidence upon which it is contended that the company is estopped to urge the independency of the relation with Henson. There can be no doubt but that Chunn believed himself to be in the service of the company. It is true that this would not be controlling, for the reason that this belief would of itself not constitute him an employe. But if the defendant throughout so conducted itself as to justify Chunn in this inference, he is in the position to invoke an estoppel to deny him employment as a servant. *Good v. Johnson*, 8 L. R. A. (N. S.), 897; *Johnson v. Owen*, 33 Iowa, 512; *Griswold v. Davis*, 125 Tenn., 223; *Coal Co. v. O'Brien*, 3 Higgins, 252; *Woolwine v. Oppenheimer*, 4 Higgins, 134; 14 Ruling Case Law, page 77.

Chunn had once worked for another firm for whom Henson was foreman, and he was retained in this employment in the same way as in the other. He was on the premises under express or implied instructions of the defendant to conduct himself as did the other servants, and in possession of cards denominating him a servant of the latter, and with directions as to his entrance and exit, all coming from the company and indicative in every way of

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an understanding that he was working and promoting the interests of the company and not of Henson. One deduction only is justifiable from these facts, and that is that the defendant held itself out or so conducted itself toward Chunn as to give him warrant for believing that he was the servant of the company and not of Henson. The learned Circuit Judge was in error in resolving this question against the plaintiff.

The result of the foregoing is of course to bring about a reversal of the action of the Circuit Judge in dismissing the suit upon the ground that Chunn was not in the employment of the defendant.

We now recur to the question as to what shall be done in the case in its further proceeding. While not expressly urged, we understand learned counsel for plaintiff in error as insisting that this Court pronounce judgment in his favor upon the verdict.

It is contended upon the other hand by learned counsel for appellee that should the case be reversed there must be a remandment for a new trial upon all the issues, for the reason that its motion for a new trial and a setting aside of the verdict was never disposed of by the Court, and the rendition of a judgment upon the verdict would be a denial to it of the right to have the Circuit Judge review the evidence tending to support the verdict and to approve or disapprove of it as the thirteenth juror; and it is insisted that this is a condition precedent to the right of this Court to pronounce a judgment in favor of the plaintiff.

We are of opinion that this contention of appellee is well predicated, and that we must yield to it. The question thus raised was passed upon by the Supreme Court, speaking through special Justice Gohlson, in the case of *Neill v. Casualty Co.*, 135 Tenn., 28, wherein it was held that the practice of pronouncing judgment *non obstante*

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veredicto was not proper where there were disputed questions of fact upon which ultimate liability rested. We are of opinion that when several questions of fact arise in a case in which the right of a plaintiff to recover an uncertain amount and upon controverted testimony is involved, and when the correctness of the verdict is challenged by a motion for a new trial, this Court cannot pronounce a judgment upon the verdict in the absence of a showing that the trial Judge himself passed upon the issues raised. We are of opinion that any other rule would work injustice and would be hazardous, and would not be in keeping with the rules governing *nisi prius* trials. But we must not be understood as intimating that in no case should judgment final be pronounced. Many cases where this can be done are conceivable.

There is controversy in this case as to how Chunn was hurt. It is true that he was injured by falling from or the falling of a scaffold used while working on the building; but whether this scaffold was negligently constructed, and whether he knew or ought to have known of its condition, were debatable questions. Hence the necessity of a reversal and the ordering of a new trial to the end that there be rendered a verdict on disputed facts meeting the approval of the Circuit Judge.

The judgment is reversed and the cause is remanded for a new trial. Defendant in error is taxed with the cost of the Court.

NOTE.—In this case the order of remandment was modified so as to direct that the Circuit Judge proceed to a consideration of the motion for a new trial filed by defendant.

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MRS. MARTHA HUDKINS v. CITY OF MARTIN.

(Affirmed by Supreme Court, 1917.)

1. MUNICIPAL CORPORATIONS. *Notice of injury and claim for damages, sent by husband, sufficient.*

A notice, signed by the husband of a woman who has been injured as the result of defective sidewalk, addressed to the mayor, informing him of place and date of injury and of the intention of the husband and wife to claim damages, will be treated as substantial compliance with Acts 1913, Chapter 166, in subsequent suit for damages brought by the wife alone.

2. SAME. *Notice addressed to mayor and aldermen and read to all these officials by recorder within ninety days, will be treated as sufficient, although not actually delivered to mayor.*

And the fact that such notice is addressed to the mayor and aldermen will not vitiate it if in truth it reaches the mayor in time; and the reading of the notice to the mayor and aldermen assembled by the recorder will be treated as the giving of requisite notice to the mayor.

3. SAME. *Liability of city for defects occasioned by washouts where defects remain unremoved for several days after rain.*

Conceding that a municipality should not be held liable for defects in a sidewalk occasioned by heavy rains, this rule cannot be availed of where the defects thus caused remained exposed and unremoved for a sufficient length of time to charge the officials with constructive notice thereof.

FROM WEAKLEY COUNTY.

Appeal in error from the Circuit Court of Weakley County. JOSEPH E. JONES, Judge.

Hudkins v. City of Martin.

WILLIAM RANKIN for Plaintiff in Error.

THOMAS MEEKS for Defendant in Error.

SPECIAL JUSTICE R. H. SANSOM delivered the opinion of the Court.

THIS is an action for damages for personal injuries alleged to have been sustained by the plaintiff below, defendant in error, Mrs. Martha Hudkins, by stepping into a hole in the pavement or upon the sidewalk within the corporate limits of the plaintiff in error, defendant below, the city of Martin.

There was trial in the lower Court before the Judge and jury resulting in a verdict in favor of the defendant in error and against the plaintiff in error for \$700.00 and costs.

There was motion for new trial in the lower Court based upon a number of grounds which was overruled and the plaintiff in error has brought the case to this Court and assigned errors here, twelve in number, which will be taken up and disposed of in their order later on in this opinion.

The declaration was filed October 15, 1915. The plaintiff in error demurred to the declaration because it, as averred in the demurrer, failed to state the amount of damages sought in the body of the declaration.

The declaration was amended and amount sued for was fixed at \$5,000.00.

Plaintiff in error, defendant below, interposed plea of not guilty, and plaintiff below, defendant in error, joined issue on this plea. Later on, on the 14th day of April, 1916, the city of Martin interposed a special plea to the effect that the plaintiff did not comply with the requirements of Chapter 55 of the Acts of 1913, providing that no suit shall be brought against any municipal corporation

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in Tennessee on account of injuries received by persons or property because of the negligent condition of any street, alley or sidewalk, or highway of such municipality, unless within ninety days after such injury a written notice shall have been served on the Mayor of the municipality stating the time and place where the injury was received and the general nature of the injury inflicted. Said statute providing upon its face that a failure to give this notice within the time prescribed would constitute a valid defense against liability upon the part of the city, and it is averred in this plea that the plaintiff below did not give this notice.

The plaintiff below joined issue upon this special plea.

The facts of the case are as follows:

It is made to appear that the plaintiff below, Mrs. Martha Hudkins, with her husband and their family, lived on Sterling Street in the city of Martin, Tennessee, in Weakley County, and that on the 19th day of October, 1914, about seven o'clock P.M., Mrs. Hudkins accompanied by three boys, her son Alonzo, Latan Vowell and Van Geter, went down Sterling Street from her home for the purpose of visiting a Mrs. Kempall, another resident of the city on the same street, and deliver to her some message.

The direction taken in going to Mrs. Kempall's was south, and Mrs. Hudkins, with the boys attending her, pursued her course down the west side of the street which was paved until she had reached a point where Sterling Street crosses McGill Street. According to the record this point is about four hundred feet from Mrs. Hudkins home, and it may be stated just at this point that the darkness had drawn a veil around the point, and there were no city lights closer than about four hundred feet, one in front of the home of Mrs. Hudkins and one in another direction about 250 feet from the point where McGill Street crosses Sterling Street. As Mrs. Hudkins reached this point in

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the darkness, and when she had reached the south edge of McGill Street where the cinder walk ceased or came to an end, and where the walkway or paving was about from six to ten inches above the surface of McGill Street, she stepped off of the end of this paved walkway with her left foot, and then following that with her right foot, attempting to step forward, her foot went into a hole in the surface of the walkway having a depth of from six to ten inches. It was dark, and she was unable to see or perceive the hole, and upon thus stepping into it she was thrown forward with a greater or less degree of violence, catching herself upon her left hand and arm, and in doing so she suffered what the record terms a colles fracture of the bones in the left arm or wrist. She was assisted to arise by her son, and proceeded on her way to Mrs. Kempall's, only a very short distance from the point of the accident. There she was met by Mr. and Mrs. Kempall and almost immediately began her return journey home, perhaps being accompanied by Mr. Kempall, as well as the three boys who were with her going down to this point. In order to avoid any recurrence of trouble at this point of falling into the hole again a lamp was carried from the Kempall's up to that point so that they could pass over the place and get upon the sidewalk.

It is apparent from the facts developed in the case that this hole that she stepped into had been there for a number of days, and the Court is satisfied from the evidence that it had been there a sufficient length of time to have afforded the city notice of the defective condition of the walkway, even if it had not been actually known to the city authorities.

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It appears from the record that at the request of the plaintiff, Mrs. Hudkins, her husband delivered to the city

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authorities a written notice of the injury. Just exactly what the written notice contained is not absolutely clear. The husband of the plaintiff below says that he wrote the notice and addressed and delivered it to the Mayor of the city of Martin. He says that the notice was addressed to the city authorities, and read about as follows:

“On October 19th, about seven P.M., my wife, Mrs. A. H. Hudkins, fell and broke her arm at about seven P.M. on her way down to Mrs. Kempall’s at the terminus of the concrete walk on the west side of Sterling Street leading south from my home and on account of this break we think she is entitled to damages for loss of time and physical and mental agony.”

The husband says that he did not keep a copy of the notice thus given, but that is his recollection of the substance of the notice. He says that this notice was given, as he recollects, some time before the 1st of January, 1915, the accident having occurred on October 19, 1914. The statement of the witness Hudkins is that he delivered this note personally to the Mayor of the city, A. B. Adams.

The Mayor was examined, and he says that Hudkins did not deliver this written notice to him in person. He says that he was approached by Mr. Hudkins in regard to the matter, and that Hudkins said to him, the Mayor, several weeks after the accident happened that he felt like he had incurred some expense, doctor’s bills, etc.; that he had thought of asking the city to reimburse him, but hesitated to do so. The Mayor says that he told him he had no authority to act upon such matters, and the question would have to be presented by him to the Board for action. He says that there was never any notice in writing served upon him as Mayor in regard to the matter. He says that Mr. Hudkins, the husband of the defendant in error, asked

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him what he ought to put in a letter to the Board, and that he, the Mayor, declined to advise him on that subject. The Mayor says that there was a letter read by the Recorder to the Board of Mayor and Aldermen from the husband of the defendant in error, and he thinks this occurred during the early part of the year 1915, but that no action was taken upon the part of the Board in regard to the matter. He says the letter was addressed to the Mayor and Board of Aldermen of the city of Martin, and was in substance about as follows:

“On October 19, 1914, my wife fell at the south end of Sterling Street and broke her arm, and although she does not expect any compensation for the suffering she has undergone, there has been some expense in the way of doctor's bills that I feel that the city should partly bear. I would be glad if you would take the matter under consideration.”

The Mayor does not assert that that is the exact language of the communication, but that is the substance of it as he recalls it.

So soon as this statement had been made by the Mayor upon the witness stand, he was served with subpoena *duces tecum* requiring him to bring into Court the letter mentioned in his testimony, and that was not complied with, and the reason given for not doing so was that the communication could not be found. Thereupon the witness Hudkins, husband of the defendant in error, was permitted to testify orally as to the contents of the communication sent by him to the Board of Mayor and Aldermen.

As stated, under the facts disclosed in the record, and after argument of counsel the jury returned a verdict in favor of the plaintiff below and against the defendant below for \$700.00.

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It is not deemed essential or necessary that the Court shall set out each separate and distinct error assigned in full as assigned.

The second error assigned is the Court's permitting the witness Hudkins to be recalled for purpose of examination in chief after his examination had been concluded. We have examined the record and find no reversible error in the course of procedure touching the matter in this case. Courts are invested with large measure of discretion in respect of the manner and method of the introduction of testimony, and it is always the desire and purpose of the Court to get at the facts as they really are, and discretion is always rightfully exercised toward accomplishing that end. There is no error in the Court's action in this respect.

The third and fourth assignments of error direct themselves to the Court's action in refusing to sustain motions for peremptory instructions made by the defendant below, plaintiff in error, at the conclusion of the plaintiff's testimony and at the conclusion of the whole testimony. Under the statement of facts as hereinbefore incorporated, the necessity for going over this ground is obviated, and manifestly under those facts no error was committed by the Court in overruling these motions.

The fifth assignment of error is that there is no evidence to support the verdict of the jury. It would be a matter of interest to the Court, and it would rather enjoy going over a discussion of the question raised by this assignment, in detail, but it is not deemed material or expedient to do so because the facts have been fully set out and it is altogether apparent, in the opinion of this Court, that there was evidence adduced to support the verdict and judgment of the jury and Court.

The seventh error assigned is as follows: "The Court erred in refusing to charge special request No. 1 of the

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defendant, which is as follows: 'If you find that there had been heavy rains that had washed out under the walk and that when the plaintiff stepped on to the cinder walk and the cinder walk broke through with plaintiff when she stepped on it, then I charge you the city would not be liable, and it would be your duty to render a verdict in favor of the defendant.' "

It should be said in disposing of this assignment that in the trial of the case in the Court below it was the insistence of the plaintiff below that there had been no heavy washing rains during two or three days preceeding the happening of the accident resulting in the injury complained of. While the plaintiff in error, defendant below, insisted and attempted to prove that there had been very heavy rains during the two or three days just preceeding the accident complained of, and that as a result of these heavy rains the foundation of the cinder lithic walkway, in which was the hole into which the plaintiff below stepped, and as a result of which she was injured, was washed out underneath this cinder lithic surface, thus creating the hole within such short time as that the plaintiff in error, defendant below, did not know of its existence and was not charged with knowledge thereof as matter of law because of the short period of time. A great deal of proof was introduced by both sides of this controversy upon this proposition, some of the witnesses swearing that there had been heavy rains and sufficient water accumulated at this point where McGill Street crosses Sterling Street to have caused the wash-out asserted, while other witnesses said that there had been no such rains, and still other witnesses said that the hole into which this plaintiff is said to have fallen had existed for some days prior to the injury, some of the witnesses putting it as long a period back as a week before the injury occurred. These questions of fact under conflicting state-

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ments of witnesses were submitted to the jury for its determination under a proper charge from the Court, and there is evidence to support its finding, and we therefore are constrained to overrule this assignment of error.

In assignment of error Number 8 it is insisted that the Court erred in refusing to charge the special request of defendant below, plaintiff in error, in these words: "If you find that there was a defect in the cinder walk, and that defect was a latent and hidden defect, and that the walk appeared to be in good condition and the city did not know of the hidden defect, then I charge you that the city would not be liable, and it would be your duty to return a verdict in favor of the defendant."

The Court in his charge said to the jury: "Before the plaintiff, Mrs. Hudkins, can recover in this case she must show by a preponderance of the evidence that the city of Martin was negligent in keeping its streets in proper repair, and not only that, she must show by a preponderance of the evidence that by reason of the hole that was in the street, which the city of Martin negligently permitted to be there, that that was the proximate cause of the injury."

There is nothing in this record in so far as the facts are concerned that would lead the Court to charge in respect of any latent defect in this cinder lithic walk. The whole theory of the plaintiff's proof in the case goes to the existence of the hole in to which she stepped, and as a result of which she was injured, and the Court's charge, as above set out, devolves upon the plaintiff the burden of showing that there was a hole in the street which was negligently permitted by the city to remain there, and that this hole was the proximate cause of the injury complained of. She must show all this as a condition precedent to her right of recovery. This clause in the charge of the Court covers the entire question, in the opinion of this Court, and makes

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it as strict as the plaintiff could have been required to be in order to have secured her recovery.

The ninth assignment of error is the Court's refusing special request Number 3, which is as follows: "Gentlemen, I charge you that plaintiff must show that she served a written notice on the Mayor within ninety days after the accident, and if you find that the proof fails to show that it was served within the ninety days, then I charge you that plaintiff cannot recover."

The Court charged the jury on this subject as follows: "If you believe by a preponderance of the evidence that she was entitled to recover, and then that she gave the notice within ninety days to the Mayor; that it was a written notice stating the time and place of her injury, then that would be a compliance with this law in reference to the notice. Although the notice may have been given within ninety days, that would not entitle her to recover unless she show herself to be entitled to recover independent of the notice being given within ninety days; if it did not come to the knowledge of the Mayor in writing within ninety days showing the time and the place and the general nature of the injury, then she could not recover." The Court thus instructed the jury after having practically set out in terms the requirements of the Act and stating to them what the terms of the Act were. So that this question was fully covered by the Court's charge, and there was no necessity and no good result to be obtained from a repetition of what the Court had already, practically and in substance, said to the jury.

This same statement may be applied to assignment of error Number 10, which is in these words: "The Court erred in failing to charge special request as follows: 'I charge you, gentlemen, that the burden of proof is on the plaintiff to show that the notice required by Chapter 55 of

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the Acts of Tennessee for 1913 was served on the Mayor, and if the proof fails to show that, then I charge you that it would be your duty to return a verdict in favor of the defendant.' "

As stated, the Court had already in his charge so instructed the jury in effect and substance and a repetition thereof was not necessary, and there was no error in his refusal.

Number 11 is that the Court erred in his charge as follows: "Now, gentlemen, if Mr. Hudkins representing his wife, and for his wife handed to the Mayor of Martin, Mr. Adams, a notice stating to him in substance that his wife had fallen on the cinder walk just south of the concrete walk on Sterling Street where it intersected with McGill Street, and said to him in that notice that his wife had fallen in a hole, or in a defective place in the street, and said that within ninety days from the date of the injury, stating the time and the place, and stating that her arm was broken by the fall, then that would be a notice within the meaning of this law, provided it was done within ninety days after the injury."

We understand that the insistence of plaintiff in error is that there is no proof in the record showing that Mrs. Hudkins gave this notice, and that the giving thereof by her husband, Mr. Hudkins, was not the notice required by the Act. In other words, the insistence of plaintiff in error is that Mrs. Hudkins was the only person who could give that notice. This Court does not concur in that view. In our opinion if the notice was given by Mr. Hudkins for his wife at her request, and was given within the time fixed by the Act, and contained in substance what the Act required, and was given to the Mayor, that, in our opinion, met the requirements of the law, and that was the view taken of it

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by the lower Court in his charge, and there was no error in that charge.

The twelfth and last error assigned is in these words: "The Court erred in charging the jury as follows: 'I charge you that the Hudkins were not bound under this law to deliver a notice directly to the Mayor, but if it was directed to the Mayor and Aldermen and reduced to writing, and contained the proper contents, although it may have first come into the hands of the Recorder, if the Recorder read it in the presence of the Mayor and Aldermen, and did that within ninety days from the date of the injury, that would be such notice as the law requires, and if such notice was given, it would not bar an action on the part of Mrs. Hudkins, and now, gentlemen, the question of fact for you to determine is as to whether the Recorder read that notice, if he had such notice, to the Mayor and Aldermen and brought it to their attention within ninety days after the injury occurred.' "

The insistence is, as we understand it, under this assignment of error that by the express terms of the Act the notice must be addressed, given to, and served upon the Mayor, and the Mayor alone, and that otherwise it is insufficient. This Court does not concur with that view, but is of opinion that the charge of the Court as delivered to the jury, and above quoted, is a proper interpretation of the requirements of the Act, and that there was no error in the Court's charge to the jury.

It follows that the assignments of error are not well founded, in the opinion of the Court, and they are accordingly overruled and the judgment of the lower Court is affirmed with costs.

Simpkins v. Moorehead & McGee.

W. H. SIMPKINS v. MOOREHEAD & MCGEE.

SALES OF SEEDS FOR PLANTING. Failure to comply with Acts of 1909, Chapter 395, regulating sale of grain for seeding. Dealer liable for failure of seed to germinate.

A dealer who sells seeds for planting is liable in damages to the purchaser with or without warranty if such seeds fail to germinate for lack of germinating quality, if the dealer has not observed the requirements of the Seed Act of 1909, Chapter 395, respecting the tests for ascertainment of germinating percentage.

FROM DAVIDSON COUNTY.

Appeal in error from the Second Circuit Court of Davidson County. HON. F. A. BERRY, Special Judge.

HARRY LUCK for Plaintiff in Error.

GEO. M. THOMAS for Defendants in Error.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

SIMPKINS brought this suit to recover damages for an alleged breach of warranty and breach of the law in selling seed oats. He specified as his damages the purchase price of the oats, the cost of some Timothy seed to be mixed with these oats and the cost of preparing and tilling the land.

Defendants in error are dealers in seeds in the city of Nashville. They admitted having sold to Simpkins the quantity of seed oats specified, but urged by way of defense

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to his action that there was neither an express nor an implied warranty of soundness, that they had supplied him with the exact description of seed called for by him, and that the Acts of 1909, 395, regulating the sales of seeds could not be the measure of liability for the reason that the Act was void.

This controversy was tried by Hon. F. A. Berry acting as Special Judge. He was requested to and filed written findings of fact and conclusions of fact and law. He found that there was no express warranty as to germinating power. He also found that there was no implied warranty as to purity with respect to germinability, and was of opinion that Simpkins could recover under the statute in question only if at all, and not under the common law. The learned Judge thereupon proceeded to consider this Act and reached the conclusion that it was unconstitutional. The result was that Simpkins was denied a recovery. He has appealed and assigned errors.

Since the trial in the lower Court the statute, which is known as the seed law, has been declared constitutional. *State v. Mackay*, 137 Tenn., 280. The inevitable consequence is that the observance of this statute, too long neglected, is enjoined upon all seed dealers in Tennessee. This law being of wholesome character, passed for the purpose of promoting agriculture, that most vital of all occupations, it is the duty of the Court to see that its provisions are observed, and also to prevent evasions and to nullify excuses offered or efforts made to thwart the Department of Agriculture in the enforcement of the law's provisions.

It is provided in Section 5 that seeds not coming up to the standards of purity and viability prescribed in Section 9 shall be considered unsound, and that they shall not be exposed to sale for seeding purposes by any dealers in seeds without ascertainment of germinating quality and com-

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munication to the purchaser of the lack thereof. For while the act in question requires a high standard with respect to seeds, we interpret it as permitting the seller with respect to germinating power to make sales of those which possess a percentage beneath that prescribed by the statute, provided the dealer so informs the purchaser by appropriate certificate or word at the time. It is true that from a casual reading of the statute there might be gathered the impression that the seller was absolutely prohibited from exposing to sale seeds below the standard of purity, but when Sections 1 and 5 are considered together, or as for that matter when the whole statute is brought into view, it is reasonably certain that the Legislature was willing to remit the purchaser and seller to their respective rights and risks in handling seeds expressly and statutorily asserted to be beneath the prescribed degree of purity.

It must be observed that the act requires of dealers and importers in seeds the submitting of their stocks to the agents of the Department of Agriculture with the view of determining degrees of purity, and further directs that the analysis, especially if the seeds are below the standards prescribed, shall be stamped upon the package.

The evidence heard by the learned Circuit Judge is not in the record. In lieu thereof is the finding of fact of some elaboration, but yet not as full as we should like for an exposition of the very important question arising. We nevertheless gather from the findings that the seeds purchased by Simpkins possessed very little if any germinating power; and there is no attempt to show that they had been tested or inspected and their degree of purity stamped upon the package or the lack of purity or germinating power communicated to the purchaser. This suffices to warrant the conclusion that the dealers in this case violated the seed law, consciously or unconsciously, and that Simp-

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kins is in a situation where he can claim the benefit of the statute and rely upon it for redress, and that he is not confined to the common law as his remedy.

Nor can any negligence of Simpkins or his purchase of the seeds upon his own judgment or that of his friends have the effect of waiving the statute or of taking away his right to complain of the dealer for not observing its provisions. We repeat that the chief object of this law was to onerate dealers in seeds with the burden of ascertaining the standard of purity of their goods and of informing their purchasers of this degree, and that nothing short of an inspection and communication in a legitimate way of the deficiency can excuse the dealer.

A failure upon the part of the dealer to follow the directions of the statute is denounced as a misdemeanor. It is urged by very able counsel for appellees that his clients could not be convicted of a misdemeanor for the reason that there is no evidence showing an intent upon their part to commit a crime. It will be noted upon reading the statute that it does not require knowledge or guilty intention to constitute an offense. An omission to observe the directions of the statute, whether this omission be intentional or the result of neglect, is denounced as a misdemeanor. Hence it is not incumbent upon the State or the party complaining to show a guilty purpose. *Haynes v. State*, 118 Tenn., 709; *Pappas v. State*, 135 Tenn., 499.

It is axiomatic that a party injured in a pecuniary way by the commission by another of an unlawful act may sue for damages. We know of no reason why the purchaser of seeds may not avail himself of this almost universal rule of law.

It is urged that the exactions of the law are too burdensome upon seed dealers. This must be addressed to the Legislature, and not to the Court. But we shall observe in

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response to this contention that when the need of crop stimulation is considered and when the high cost of cultivating lands and rental values thereof are kept in view; and when it is borne in mind that dealers can with little trouble ascertain the quality of their seeds, the argument of inconvenience must pass away.

Much is said by learned counsel to the effect that Simpkins got the exact description of seeds called for, and that this excluded all idea of implied warranty other than that the seeds were the kind requested; and especially is it urged that there was no express or implied warranty of germinability. It is probably true that there was no express warranty of germinability, and it may be also true that the circumstances excluded any implied warranty as interpreted by the greater number of authorities treating of the common law measure of liability. But we apprehend and so hold that the rule is changed, and that there must be in Tennessee an implied warranty upon the part of the dealer that his seeds are up to the standard prescribed by law in the absence of positive and lawfully authorized communication at the time of the fact that the seeds are below the standard of germinating power prescribed by the statute. We are of opinion that the stipulation of purity goes with every seed transaction, and that it can be excluded only by a strict compliance by the dealer with the statute under consideration.

But in truth we are of opinion that many decisions touching liability at common law are unsound when applied to seed transactions. It must be admitted that the majority are to the effect that when the purchaser has the opportunity to inspect and orders seed of a certain description, he is limited in his warranty to the requirement that the seed be of the kind requested, and that there is no implied warranty of germinating power. But notwithstan-

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ing these pronouncements we believe that the common sense surrounding such transaction is that the purchaser may not only expect that the seeds be of the kind or description purchased, but that they shall also possess germinating power. And especially should this be the rule when the purchaser informs the dealer that he intends these seed for reseeding purposes. The unmistakable implication is that the purchaser is going to make a great outlay of time and labor. This would be folly if he were sowing seeds that would not germinate. Hence our opinion that when a dealer sells seeds to be resown he impliedly warrants their germinating power in the absence of an express refusal to warrant or of an express warranty of so restrictive a nature as to exclude all implications. These various phases are elaborately discussed in the note to *Seed Co. v. Canning Co.*, 37 L. R. A. (N. S.), 79, and note. And also in the case of *Totten v. Stevenson*, 135 N. W., 17.

However that may be, there is no escaping the conclusion that the agriculturists of the country now have the right to rely upon the beneficent provisions of the seeding act; and when this act is brought into view and considered in connection with the implications of the common law, plaintiff in error was upon the showings made in the lower Court entitled to a judgment for damages. Owing to the fact that his damages were not developed in the lower Court and embraced in the findings we are unable to follow in this case the usual practice of rendering judgment instead of remanding.

It results from the foregoing that the judgment of the learned Judge will have to be reversed and the cause remanded with directions to retry the case according to principles not inconsistent with the pronouncement of this opinion. Appellees will pay the costs of this Court.

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It might be well to observe by way of precaution that if it should develop upon the trial in the lower Court that Northern white oats such as were purchased by Simpkins would not germinate in this soil and climate, Simpkins probably should not have any recovery at all. But it is so universal as to be almost judicially known that Northern-grown seeds germinate and fructify more quickly in the South than the home-grown product. Another observation that might be made is that if it should be shown conclusively that Northern white oats were an experiment, and that their germinating power or quality was inherently such as was unsuited to this territory, there might be grave doubt of the liability of defendants in error. But when it is recalled that it is an easy matter for a dealer by hotbed or small box planting to test the germinability of seeds, and when it is considered that the Commissioner of Agriculture might devise easy methods of ascertaining germinability, it would be a rare case in which a dealer could escape the consequences of selling nongerminating seed by urging that they would not grow in this climate.

We wish in conclusion to say in justice to the very eminent Special Judge who tried this case that there were at the time of the trial of this case in the lower Court serious doubts as to the constitutionality of the seeding act.

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SARAH WELLS v. LEVI JENKINS.

(Certiorari denied by Supreme Court, 1917.)

1. **EVIDENCE.** *Chancellor not in error for not passing on exceptions to evidence, when his action was not invoked.*

The chancellor cannot be put in error for failing to pass on exceptions to depositions where it is not shown by the record that his attention was ever called to the exceptions or any action invoked by him thereon, or that he even so much as knew of such exceptions. In such case, such exceptions will be considered as waived.

2. **LIFE INSURANCE.** *Oral assignee of policy, without insurable interest, may collect same, when.*

The possessor of a life insurance policy, by oral assignment and delivery, acquiesced in by the insurance company, where there is no fraud or imposition in its acquisition, may collect the insurance money, although not having an insurable interest such as would authorize or justify the taking out of a policy on the life of the insured.

3. **SAME.** *Same. Objection of prematurity of suit of such assignee is without merit, when.*

There is nothing in the objection that such oral assignee's suit was prematurely brought, upon the ground that complainant should have waited until the administrator of the insured had collected the policy. The policy was not the property of the insured at the time of her death, and, of course, did not pass to her administrator.

4. **COSTS.** *Due his own witnesses will be taxed to the administrator, when.*

Where the litigation resulted from the failure of the administrator to see and confer with those possessed with a knowledge of the facts whereby he would have reached the proper

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conclusion which would have prevented the litigation, he should be personally charged and taxed with the costs due his own witnesses.

FROM SHELBY COUNTY.

Appealed from the Chancery Court of Shelby County.
Part 2. FRANCES FENTRESS, Chancellor.

MURRAY & GILLESPIE and H. R. SADDLER for Complainant.

B. F. BOOTH for Defendants.

MR. JUSTICE HUGHES delivered the opinion of the Court.

THIS suit, which was brought in the Chancery Court of Shelby County by Sarah Wells, has for its object an adjudication as to whether the proceeds of a certain policy of insurance on the life of one Julia Jenkins, deceased, should be paid to complainant, or to the administrator of the estate of Julia Jenkins on whose life the policy was issued and in force at the time of her death.

At the time of the death of Julia Jenkins the policy itself was in the possession of the complainant, who insists that it had been given or assigned to her, and put into her possession by the deceased that she might become and be the beneficiary thereunder; while the administrator insists that complainant had no legal or equitable interest in the policy, or its proceeds, she, as he insists, having procured possession of the policy by fraud.

The Insurance Company issuing the policy, it appears, was and is willing to pay the amount called for by the

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policy, \$146.00, but did not and does not want to assume the responsibility of deciding who was and is entitled to the proceeds, and therefore refused to make payment to either claimant until the question as to the party legally entitled thereto be determined.

Under this state of facts the complainant brought this action against the administrator, setting out and alleging in her bill that the policy had been given or assigned to her with the consent and agreement of the insurer, and that, pursuant to the gift, and according to the conditions thereof, she, the complainant, had taken the policy and kept the premiums paid, and is therefore entitled to the amount due thereon.

The administrator answered the bill, denying that the policy had been given to complainant or that there had been any transfer thereof in any way; and charging in the answer that Julia Jenkins, the insured, was an ignorant old negress, and that it was by fraud and imposition on her that possession of the policy had been procured. It is also set up and pleaded in the answer that complainant had no insurable interest in the life of insured, and that for that reason any transfer of the policy that may have been made was illegal and void.

Each party to the suit took depositions in support of its contention, on which depositions the cause went to trial before the Chancellor, who found the issues in favor of complainant, and decreed that she was entitled to the \$146.00; and, that the proceeds not being any part of the estate of Julia Jenkins, deceased, the administrator was not entitled to the possession of the policy. The bill was therefore dismissed at the cost of the defendant, who appealed from that decree to this Court, and has here assigned errors, making questions which we will consider in the following order: 1. It is said that the trial Court com-

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mitted error in refusing to pass upon certain exceptions to evidence offered by complainant on the trial below, on the ground, as insisted, that the evidence was incompetent.

We find no error in this regard, it being nowhere shown that the Chancellor's attention was ever called to the exceptions to the evidence, or any action invoked by him thereon. All that appears is that counsel for complainant filed with the record, and as a part of it, exceptions to certain portions of depositions taken in the cause. Absolutely nothing is made to appear as to whether the Chancellor ever so much as knew of the exceptions, it nowhere being disclosed that his attention was ever called thereto, or any ruling asked thereon. Of course, under this state of facts there can be no just complaint based, for the reason that the Chancellor cannot be put in error for failing to pass on exceptions to depositions when it is not shown that he so much as knew of such exceptions. If such exceptions must be shown by the record to have been brought to the attention of the Chancellor and acted on by him, or they will be considered as waived. *Montgomery v. Coldwell*, 82 Tenn., 29, 37. See also Gibson's Suits in Chancery, Section 535.

2. By another assignment it is contended that complainant bore no such relation by consanguinity, creditor or otherwise to deceased as gave her an insurable interest in her life, and that therefore, she, in no event, could be entitled to the proceeds of the policy thereon. The reply to this contention is that complainant does not claim the proceeds of the policy by virtue of having any such insurable interest in the life of the insured, or under conditions that require any such interest in the sense of the rule invoked. The insistence of complainant is that deceased had perfected the insurance, and had the policy issued on her own life, and, after carrying it for some years, made a gift

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thereof to complainant on condition that she would thereafter keep the premiums paid, which was done as an expression of appreciation of services that complainant had previous thereto rendered deceased; and the record discloses that in fact, previous to the time it is claimed the policy was given to complainant, deceased had become reduced to such financial straits as that she was not able to carry the policy longer, and made the gift to deceased on the condition that she pay the premiums which should thereafter fall due. Complainant says she had paid rents for the deceased, and had otherwise assisted her financially, and that deceased realized that she would not be able to longer keep her premiums paid, delivered the policy to her, complainant, that she might thereafter keep the premiums paid and become the beneficiary. On the contrary it is insisted by the defendant that deceased was an ignorant old negress, not able to so much as read or write, and that complainant deceived and imposed upon her, and thereby got possession of the policy, and even paid the premiums thereafter out of the insured's property and effects.

Several witnesses were offered by the parties to this contention in support of the theories, each offering evidence in support of the theory contended for by that party. The Chancellor found, and after a careful reading of the record we concur in his view, that the possession of the policy was not procured by fraudulent means as insisted by defendant, but that it was the intention of the insured to give the policy to complainant, Sarah Wells, that she, Sarah, might thereafter pay the premiums and be, to all purposes, the beneficiary therein. This view of the case is supported by officers of the Insurance Company. The agent of the company who collected premiums on the policy in question swears that the insured told him that she wanted the proceeds of the policy "to go to Sarah Wells at her (insured's)

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death," and says further that Sarah Wells thereafter paid the weekly premiums as they fell due on the policy, saying that she made such payments directly to him, the agent, keeping them paid up after the policy was delivered to complainant until the time of the insured's death, which is shown to have been two years or more.

The superintendent of the Insurance Company also testified in effect that he had had a conversation in regard to the same matter with the insured, and while he did not remember or pretend to recall the details of that conversation, it, as he expresses it, "was to the effect that she (the insured) wanted Sarah Wells to look after her insurance and other matters;" and he says further that Sarah Wells then had the policy in her possession; and still other witnesses testify to the effect that the insured had told them that she had given the policy to Sarah Wells. It is true that several other witnesses swear to circumstances indicating that there was no such friendly relations between the insured and Sarah Wells as Sarah says existed, and therefore no occasion to make the gift that Sarah insists was made. But we are of the opinion, and find, that the weight of the testimony supports the theory and contention that the policy was given to complainant by the insured, and that the gift was not procured by any fraud or imposition; and it appearing that Sarah kept the premiums paid up thereafter; and it appearing that the policy had a provision stipulating that "the company might pay the policy to any relative by blood or by marriage to the insured, or any other person appearing to said company to be equitably entitled to the same by reason of having incurred expenses in any way on behalf of the insured, or for his or her burial, or for any other purpose indicated;" and it still further appearing that Sarah Wells paid out money for the benefit of the insured, both in connection with her burial and other-

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wise; and the Insurance Company not contesting the validity of the gift or transfer of the policy and the right of complainant to collect the proceeds thereof, we are of opinion the Chancellor's decree was correct. The law involved, though appearing to be in hopeless confusion as viewed by the Courts generally, as pointed out by the various text writers, appears to be settled in Tennessee to the effect that such assignee or donee, when there is no fraud or imposition, may collect, although not having an insurable interest such as would authorize or justify the taking out of a policy on the life of the insured; and that such gifts or assignments may be made in parol, there can be no question. 12 R. C. L., 944; *Box v. Lanier*, 112 Tenn., 393; *Clement v. Insurance Co.*, 101 Tenn., 22, 36, 46 S. W., 561; 42 L. R. A., 247, 7 Am. St. Rep., 561; *Insurance Co. v. Hamilton*, 37 Tenn. (5 Sneed), 269. In the *Clement* case it is said, "the weight of authority is that when a policy has once been issued to a beneficiary legally entitled, he may assign it to another who has no insurable interest, either by a transfer in his lifetime or by a last will and testament."

3. Another question made by the assignments is that this suit was prematurely brought, for the reason that complainant should have waited until the administrator had collected the policy, if she had any right in the proceeds. The answer to this contention is that, as we have already held, the policy was not the property of the insured at the time of her death, and, of course, did not pass to the administrator, and therefore he would have no right to sue on it or otherwise proceed with the collecting of the money due thereon.

4. One other question is made by the assignments of error, which is that the Chancellor should not have taxed defendant with the costs of the proceeding. Ordinarily

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administrators should not be taxed with costs in litigations involving the interest of the estate, but the record in this case discloses such a state of facts that we have concluded this litigation was wholly without foundation, and that the administrator by proper efforts in seeing and conferring with those possessed with knowledge of the facts, would have necessarily come to that conclusion, and the litigation, having resulted from the failure of the administrator to properly conduct the affairs of the estate, the interest of which he should have looked after, he should be taxed with the costs due his witnesses, and complainant with the balance of the costs.

It results that the judgment of the lower Court is, except as modified with reference to the costs, affirmed. We might add that the estate of Julia Jenkins, deceased, is not shown to have any assets, so that to tax it with costs would simply be idle formality.

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Y. & M. V. RAILROAD v. R. E. THOMAS.

(Certiorari denied by Supreme Court, 1917.)

1. RAILROADS. *Freight conductor is not negligent in coupling his train on siding before the awaited passenger train passes, when.*

Where a freight train, consisting of fifty-eight cars besides the engine, tender and caboose, was standing on and occupying the whole of the siding, except seventy-eight feet. and while awaiting the passage of a fast passenger train, was separated into two parts, so as to leave a public road crossing unobstructed, it was not negligent in the freight conductor, but proper and safe, upon the approach of the passenger train and before its passage, to attempt to get ready to proceed on the journey.

2. SAME. *Engineer's failure to observe and obey conductor's signal to stop train is negligence imputable to railroad company, when.*

Where, after the two sections of the train were coupled on the siding, as indicated in the preceding headnote, the conductor signaled the engineer to stop the train so as to prevent the train backing and colliding with the said passenger train, the failure of the engineer to observe and obey the signal was negligence imputable to the railroad company, and rendered it liable for any injury proximately resulting therefrom.

3. SAME. *Conductor's stepping between the cars to turn the angle cock to put on the brakes does not bar recovery for injury, when.*

Where, in the situation indicated in the preceding two headnotes, after the engineer had failed to obey the conductor's signal to stop the train, which was approaching so near the main line as to endanger a collision with the said passenger train and imperil the safety of the passengers, the acts of the conductor in stepping between the cars to turn the

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angle cock so as to put on the brakes and stop the train was not so negligently and rashly putting himself in such perilous situation, in view of the imminently perilous situation of the passenger train, as to bar his recovery for an injury resulting from his feet becoming fastened between two of the ties causing him to fall and be run over by the train.

4. EVIDENCE. *The trial judge is excused for not excluding testimony when first offered, when.*

Where testimony was first offered, it was not objected to as wholly incompetent, but as admissible only under certain conditions and restrictions, and the question for some time was whether the circumstances and conditions had been shown to exist, the objecting party, however, kept restricting the scope of the application of such evidence until finally the class of evidence indicated was objected to as wholly incompetent, and the trial judge, after considerable delay finally held it so, and excluded it, and expressly instructed the jury not to consider it, he was excused and not put in error for his failure to exclude the evidence when it was first offered.

5. PERSONAL INJURIES. *Judgment for twenty thousand dollars for loss of a leg was allowed to stand, when.*

Where the plaintiff was wrongfully injured and lost a leg as a result thereof, from which he suffered much pain, and by which his earning capacity of \$160 to \$170 per month was practically destroyed, and he had a life expectancy of 34.63 years, a judgment for \$20,000 was allowed to stand.

FROM SHELBY COUNTY.

Appeal in error from the Circuit Court of Shelby County. Part 3. T. B. PITTMAN, Judge.

SIVLEY & EVANS for Plaintiff in Error.

BARTON & BARTON and CARUTHERS EWING for Defendant in Error.

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MR. JUSTICE HUGHES delivered the opinion of the Court.

ON November 2, 1914, R. E. Thomas, while in the employ of the Y. & M. V. R. R. Co. as a conductor, and while acting in that capacity in operating an interstate freight train running from Memphis, Tennessee, into the State of Mississippi, sustained personal injuries from which he lost his right leg from about eight inches above the knee. He brought suit in the Circuit Court of Shelby County, Tennessee, averring the injuries resulted from the negligence of his employer, and obtained verdict for \$25,000.00, \$5,000.00 of which was remitted by the trial Court, and judgment entered for \$20,000.00, to reverse which defendant below prosecuted its appeal to this Court, and has here made assignments of error to the number of thirty.

Mr. Thomas, while acting as conductor on the interstate trip received orders to take a siding at Hollywood, Mississippi, for the purpose of letting a fast passenger train, known as No. 14, pass the freight train at that point. At Hollywood a public road crosses the tracks at the point where the siding is located, so that when the freight train was put on the siding it obstructed the passageway over the public road; and, under the laws of Mississippi, it became necessary to "open" the public road or crossing, as the expression is used, and by which is meant to cut into two sections the train of cars that stood across the public crossing, so that travel thereon would not be obstructed. That was done, eight cars and the caboose being left north of the public road, and the engine, tender and fifty cars being left on the south of the crossing. The train, it appears, after thus broken up, stood on the siding until the fast passenger, which was to pass at that point on the main line, was heard to sound the whistle some three or four miles

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south, on hearing which Mr. Thomas in charge of the freight train, then on the sidetrack, gave the signal to his engineer to back the engine so as to again couple the two sections into which the train had been broken. The engineer responded to the signal to back the engine and section of cars attached to it till that section was brought in contact with the eight cars and caboose, and at that time, or somewhat thereafter, according to the contentions of the different parties, Thomas was caused to fall while the engine and cars were still rolling backwards; as a result part of the train ran onto and over his right foot and leg just above the knee, thereby inflicting such injuries as that thereafter the right foot and leg to a point about eight inches above the knee was taken off.

Thomas brought this suit on the proposition, and swears as a witness accordingly, that the proper course for him to pursue when the passenger train for which the freight train had been sidetracked was approaching the point of passing, was to take steps to get his train ready to go on its journey when the passenger train had gone by, and it was in order to accomplish that end, according to his insistence, that he signalled his train to back up so that the section of it attached to the engine might be coupled to the other section that had been detached from it in order to leave the highway unobstructed while the train stood there; and he insists, and testified as a witness, that after the section of the freight train attached to the engine had been backed to the point where it came in contact with and coupled to the rear section of eight cars and caboose, he signalled the engineer to stop, but says the engineer failed to observe or obey that signal,—that on the contrary he continued to propel the freight train northward at the rate of three or four miles an hour, notwithstanding the signal given him to stop, until the rear end of the freight train was reaching

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the point where there was imminent danger of its reaching or going so near the intersection of the sidetrack with the main track that the fast-approaching-and-near-at-hand north-bound passenger train would collide with it and thereby produce a situation that would be perilous to passengers on the passenger train, when, according to Thomas' insistence and testimony, he stepped in between two of the freight cars and shut off the air by turning the angle cock, thus putting on the brakes and stopping the freight train. His insistence is that the whole situation, so far as its being necessary for him to step between the two cars and shut off the air, was brought about by the negligence of the engineer in failing to stop the engine as he had signalled him to do.

On the contrary, it is the theory and insistence of the railroad company that it was unnecessary and improper, because of the length of the siding and the conditions generally, for any steps to be taken towards coupling the cars or otherwise getting ready to go on the southward journey, until after the northbound passenger train had actually passed. In support of this view of the case attention is called to the fact that with the train made up of the engine, tender and fifty-eight cars and caboose the sidetrack was so near filled that there was left only about seventy-eight feet space thereon in which to do the work of connecting the two sections of the train and otherwise getting ready for starting on the southward journey when the passenger train had passed; and it is said that because of the normal amount of slack required for such a movement and in the light of the remaining space on the sidetrack, that is the space not taken up by the train, any movement thereon, such as was required to accomplish the results then sought, would likely create a perilous situation.

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Whether it was proper and safe to attempt to get ready to proceed on the southward journey before the passenger train had passed, or wait until it had passed, and then get ready to proceed on the journey, hinges the chief contentions of the parties before this Court.

From the judgment of the Court below defendant appealed to this Court, and has here assigned errors to the number of thirty, and has filed its brief in this Court most earnestly insisting that because of those errors, or some of them, the judgment should be reversed and the cause dismissed or remanded to the trial Court. We find, however, on reading the briefs and record, that it will not be necessary to take up and consider separately each of the thirty assignments of error. In fact, counsel for plaintiff in error group the assignments and consider them under five separate divisions. This, we find, is the most logical and briefest method of considering the case as a whole. We will therefore pursue the same course, except that we will not follow the order in considering the questions followed by counsel in briefs and assignments.

The first contention made on behalf of the railroad is to the effect that there is no evidence showing, or tending to show, from which the jury might have found, that the plaintiff railroad company was guilty of any negligence, but that, on the contrary, it affirmatively appears as a fact that Thomas was the creator of the very situation that resulted in his own injuries; the contentions being, (1) that in the absence of a showing of any fault or negligence on the part of the railroad company there could be no liability, and (2) that Thomas, by his improper and negligent act in unnecessarily taking steps to make up the train and get it ready to pull out on the southward journey while the other train was passing, or before it had gone by, was the creator of the dangerous situation by his antecedent negli-

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gence, and therefore could not invoke the rule applied in *Railroad v. Ridley*, 114 Tenn., 727, by which one is excused for risking some danger of injury to himself in rescuing another who is in a perilous situation.

The rule of law thus relied on is well established, and has been well stated in the following language:

“In the United States it is now a well-established doctrine that, as a leading case on the subject succinctly puts it: the law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness in the judgment of prudent persons. . . . The doctrine thus applied does not enure to the benefit of the servant, if the dangerous predicament of the person whose life he tried to save was the direct result of an act of antecedent negligence on the part of the servant himself.” 3 Labatt’s *Master and Servant*, Section 1276, pp. 3563, 3567.

As to whether there was any evidence introduced on the trial below to support the contention that the engineer failed to obey the signal to stop, we find no grounds for controversy. Mr. Thomas swears in most positive terms that he did give the signal to stop, and that that signal was disregarded; and Thomas also swears that if the train had been allowed to back a few feet further when he stopped it by going between the cars, it would have been side-swiped by the passing passenger train. And that the passenger train was then approaching and getting almost to the point of passing is not disputed. Nor can it be seriously questioned that the freight train was, according to the other evidence, getting back to the point where in but a very short time more, perhaps less than a minute, it would have gotten so near the main track that it would have been struck by the passing passenger train. In fact, as already indi-

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cated herein, the contention of the railroad company itself is that because of the danger of making such movements as backing the freight train the dangerous situation was inevitable. Such is the basis upon which counsel for the railroad company predicate the insistence that it was negligence on the part of Thomas to give the signal to have the two sections of the freight train coupled before the passenger train had gone by. Then in addition to these matters, there is also evidence in the record that, notwithstanding the limited space within which to make up the freight train and get it ready for starting on its journey before the passenger train had gone by, still with proper precaution it could have been made up without any extra risk or danger, although by the observance of proper care one of the necessary steps in which was to stop the engine when the two sections had been brought together, just as Thomas says he signalled to do. This appears from the following questions and answers taken from Mr. Thomas' testimony:

“Q. And you moved that train when at the time your judgment was that it was about to go out on the main line in front of this fast passenger train?

A. Well, that—the movement that I made did not cause that condition at all.

Q. Did not?

A. No, sir.

Q. Wasn't it the move that coupled the cars?

A. The move that I made to couple the cars was alright, but the danger arose after the coupling was made, and the train kept moving on back.

Q. It was the same movement of the train?

A. But I couldn't get him to stop. He took my movement to back up, but he didn't take it to stop.

Q. You took the chances on starting it?

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A. He took my signal to start, and if he had taken my signal to stop, there wouldn't have been any necessity to go in there."

Nor does the engineer controvert this proposition. He, though denying that the signal to stop was given him, on the question of whether the train could have been coupled up in safety, when asked if the signal that was given to make the coupling was a proper signal under the circumstances, answered, "It was;" and again when asked about the propriety of coupling up preparatory to leaving when the passenger train had gone by, and about such movements, including stopping after coupling, if the proper signals had been given and obeyed, involved anybody in any danger, answered, "No, sir." And at other times in his testimony he answered to the same effect. And, though the engineer denies that he received any signal to stop, Mr. Thomas is corroborated by others when he swears to have given such signal. So, we clearly think this question as to whether this signal was given or not was one for the jury; and if it was given, admittedly it was negligence not to obey it.

Another contention is that Thomas' act in going between two of the cars with the view of controlling the brakes and stopping the train was so rash and reckless that under the rule announced and applied in *Light & Power Co. v. Hodges*, 1 Cates, 531; 60 L. R. A., 459; 79 Am. St. Rep., 844, there can be no recovery. As to this contention, when all the circumstances and surroundings are considered, we are not prepared to say that the rule invoked is applicable. Mr. Thomas swears that his feet became fastened between two of the ties, and he was thus caused to fall and be run over, indicating that but for the catching of the foot that result would not have followed; and he says he had already gotten by the train, between two of the eighteen cars, some

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eighteen feet. So we are of the opinion that the peril of the situation was not so apparent and not so great as that in the Hodges case, and was not so great that, under the circumstances, and view of the situation which confronted Mr. Thomas, it can be said as matter of law that his right of action is thereby stricken down.

But it is said that Mr. Thomas admitted in his testimony that his act in going between the cars to put on the air by turning the angle cock was, as to being dangerous, "just like jumping into a lion's den." This contention, while often repeated and much dwelt on, is not borne out by the evidence. Mr. Thomas, as he expressly swears, went in between the cars *to put on the brakes by turning the angle cock*, and not to couple the train. He says the sections of the train had already been coupled, and that he went in between the cars *to turn the angle cock, and not to couple the air hose*. That this contention as to his admitting that his going between the cars *to turn the angle cock* was as dangerous as going into a lion's den, is a misapprehension or misconstruction of his testimony is seen from the following quotation from his evidence, which includes the expression :

"Q. I said, it was necessary to get that train properly coupled?

A. Yes, sir.

Q. (Continuing.) And after coupling, to then couple up the air hose, wasn't it?

A. Not until the train stopped. Anybody with any railroad experience at all would not go between the cars and try to couple up the air hose while the train was moving.

Q. Why?

A. Because it was dangerous.

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Q. Dangerous?

A. Just like jumping into a lion's den, or anything else.

Q. In going in between a moving train?

A. To reach down there to couple the air hose, you have got to reach under the drawheads, to get the air hose on the other side and couple this one up.

Q. That was a very dangerous thing?

A. Sure it was, if a man's foolish enough to do it.

Q. As you say, it was just like going into a lion's den?

A. Yes, sir; to have reached under there and to have got the other end of the air hose, and try to couple it while the train was moving.

Q. Now, you say that the air hose had not at that time been coupled up at all?

A. No, sir.

Q. And was not connected up while you were there?

A. No, sir."

Still another contention is that the injuries inflicted on Mr. Thomas did not proximately result from the negligence of the engineer, even if he were negligent in the manner indicated. We are of the opinion that it cannot be said as matter of law that the injuries did not proximately result from the negligence indicated, if that negligence existed, as the jury found in the case.

After disposing of these matters that are subject to classification or of being divided into the subheads, we will now consider some of the questions made by the assignments that do not fall so directly under the subdivisions just considered.

One of these matters of complainant is made at the action of the trial Court in refusing at an earlier stage of the case than that at which he finally acted, to exclude certain testimony offered by the plaintiff below for the

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purpose of showing that it was a custom for the train crews in charge of freight trains on plaintiff in error's road to be ready to leave when the passing train had gone by. There was much evidence on this question offered by both sides, the *plaintiff* below having offered testimony to show that it was not only not a custom but an improper practice. We are of the opinion that the following circumstances excuse the trial Court for not at first excluding this testimony, conceding it was not admissible, a matter we do not mean to judicially pass on: When this class of testimony was first offered it was not objected to as wholly incompetent, but as admissible only under certain conditions and restrictions, and the question for some time was whether these circumstances and conditions had been shown to exist or not. Defendant below in its objection, however, kept restricting the scope of application of such evidence until finally the class of evidence indicated was objected to as wholly incompetent, and the trial Judge after considerable delay finally held it so, and excluded it; but even though it was held incompetent, defendant below repeatedly brought out more evidence of the same character. Also the Court expressly instructed the jury not to consider it. Under these circumstances we are of opinion there was no error on the part of the trial Court for these reasons: First, when the evidence was first called out and the objection first made there was no insistence that it was wholly incompetent; and, second, as already indicated, the defendant below continually brought out other such evidence even though the trial Court had held it incompetent. And a third reason is that under the express instruction to not consider it, we think it could, in no event, prejudice anyone, or if it did prejudice the defendant below, it was directly responsible for having kept the matter still before the jury.

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Another matter very seriously complained of is that a certain special request to the effect that if Thomas went voluntarily between the cars at the time the train was in motion, thus placing himself in a position of danger, when his duty did not so require, then he could not recover. The answer to this is that the Court had already more than once covered the same proposition in the charge as originally given.

Another special request it is insisted the Court erred in not giving is to the effect that if Thomas was hurt while endeavoring to couple two sections of cars, rather than attempting to avert the calamity he could not recover. The answer to this is likewise that in the original charge he had already told the jury that, "If you find that the engineer was guilty of no negligence in that case, and that the conductor without any menace caused by the act of the engineer in failing to obey the signal, went in between the cars of his own volition for the purpose of stopping the cars and not for the purpose of saving human lives endangered, then he must be deemed by the jury to have assumed the risk of his own act, and there can be no recovery, and your verdict must be for the defendant." This clearly covers the proposition.

Likewise the jury was charged on the question of diminishing the amount of recovery because of any contributory negligence and the question of the proper use of mortality tables in ascertaining the amount of recovery was correctly given in charge to the jury. We find it insisted in a brief filed here on behalf of plaintiff in error that from the mortality tables should have given the expectancy of Thomas *at the time of the trial*, rather than at the time he received the injuries; the insistence being that Thomas shows no loss from the day of the injury until the time of the trial. In answer to this it can be said that Thomas did

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introduce evidence to show what he was earning per month, and did show that from the date he received his injuries his earning capacity was practically destroyed. This, coupled with his life expectancy at the time of his injuries became significant from that date.

The most serious matter we have found in the case is the amount of the judgment, \$20,000.00. Mr. Thomas testified that he was making from \$160.00 to \$170.00 per month; and the evidence indicates that he was then strong, whereas, as the result of his injuries he was incapacitated from following his occupation, that of railroad conductor, and thereby his earning capacity had been practically destroyed; that he had lost time at his home and in a hospital, and had suffered much pain, in addition to the matter of losing time and wages; in view of all of which a majority of the Court, taking into consideration also the life expectancy of Mr. Thomas, which was shown to have been 34.63 years, and considering also the prevailing high prices of all the necessities of life, that the amount of recovery is not so excessive as to indicate passion, prejudice and caprice upon the part of the jury. Judge Hall dissents from this view, believing that the judgment should be reduced to \$15,000.00, and the writer of this opinion has serious misgivings as to the matter, but the majority of the Court being of the view that the judgment is not excessive, it will not be disturbed by this Court.

The result is, the judgment of the trial Court is affirmed with costs.

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J. D. GREEN v. MALISSA GREEN.

DIVORCE. *Desertion. Driving spouse away from home.*

A spouse, who is by force or cruelty driven from home and kept therefrom for more than two years, may maintain a bill for divorce predicated upon desertion.

FROM BLOUNT COUNTY.

Appealed from the Circuit Court of Blount County.
SAM C. BROWN, Judge.

BROWN & JOHNSON for Complainant.

GAMBLE, CRAWFORD & GODDARD for Defendant.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

COMPLAINANT seeks a divorce upon the ground of desertion. He alleges in substance that defendant and he were married in 1875, and were the parents of nine children; that they had lived together peaceably until the children reached maturity, when they and the mother formed a league against him, and that as a result of this coöperation he was forced some ten years prior to the filing of the bill to divide up his property with defendant and permit her to live separately; that some eight years ago defendant, acknowledging her fault, requested complainant to move with her to Blount County from Cocke County and buy a farm; that this was done, but that soon after the removal to Blount County defendant and the children began to mis-

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treat him, to threaten his life, to force him from the table, deny his authority in his own home and especially his right to manage his farm; that defendant would abuse complainant and would threaten him with the boys; and this treatment continued so that it was neither safe nor possible for him to dwell in his own home, and he was forced to leave and go to the soldiers' home at Johnson City, where he has been ever since; that before his departure he conveyed her the Blount County farm worth \$4,000.00, and received \$1,000.00; and it was charged that defendant had been guilty of willful and malicious desertion of the defendant for more than two years before the bill was filed.

Defendant answered. She admitted the separation, but alleged that it was voluntary on complainant's part and without her fault or procurement; that if he had incurred the ill will of his children, it was because of his misconduct; that complainant had become a drunkard and a non-worker, and was not true to his marriage vows; she also denied unkindness and her encouraging the children to mistreat him.

Complainant was the only witness introduced. The Circuit Judge was of opinion that no case of desertion was made out, and dismissed the bill. Green has appealed and assigned errors.

It is our duty to take the testimony of complainant as substantially true, especially as the main fact or issue, namely, that of separation for many years preceding the filing of the bill, was admitted.

We find that the allegations of complainant's bill were in substance the truth of the situation. For instance, we are convinced that this old man was subjected to much cruelty and indignity by the defendant and her children, and that he was virtually relegated to the rear and to a post of insignificance in the domestic establishment. In

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addition, we think it shown that his children were in the habit of threatening him and abusing him, and this with the knowledge and consent of the defendant, and that the treatment of all the parties was such as to render cohabitation unsafe and unbearable. There was left for him nothing but departure; and the defendant must be held to have been the producer and the causer of the separation. We are persuaded that she deliberately set about to procure the separation, and that her intense desire was that he leave her and never return. There was no effort upon her part to sustain a single allegation of her answer, nor was the old gentleman shaken by cross-examination. Hence our conclusion that the old gentleman was subjected to mistreatment such as justified him in leaving his home and going to the home provided for Federal soldiers.

The question presented is whether complainant can maintain this bill upon the charge of desertion, it being admitted that he was the one who had left the domicile. We have no decision in Tennessee which bears directly upon the proposition. The nearest approach to it, and this is only remotely, is the case of *Rutledge v. Rutledge*, 5 Sneed, 554, wherein it was stated that a wife who by her mistreatment of her husband causes him to leave home or to withhold marital duties has no room for complaint. In other words a wife who wrongfully interrupts or disturbs the marital relation forfeits the right to complain. It might be said that the case indirectly supports the position that a husband who is forced to leave home because of misconduct of the wife has the right to complain of the consequences of the wife's misconduct.

A significant phrasing of our statute section dealing with desertion as a ground of divorce is to be noted. Subsection 4 of Shannon's Code, 4201, is as follows: "Wilful or malicious desertion, or absence of either party without reason-

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able cause for two whole years." It will be observed that desertion and absence are put in the disjunctive, so that it may be argued that there may be desertion without absence or absence without desertion. And this furnishes foundation for the contention that desertion upon part of a defendant does not necessarily consist of departure and absence. In other words, there may be desertion upon the part of a spouse who has never left the domicile.

It has been ruled in quite a number of jurisdictions that a spouse who because of mistreatment forces the other to leave the home and remain away is guilty of desertion, especially where the misconduct was intended to have that effect. The rationale of these cases is that the spouse deliberately chooses to withdraw from the cunnubial state and leave the other in reality abandoned or deserted. In other words, this forcing of separation is a severing of the matrimonial union accompanied with the intent to terminate it and thus effect a severance, although the parties might stay beneath the same roof or the complaining one might himself depart. See *Hudson v. Hudson*, 29 L. R. A. (N. S.), and appended note; also *Whitfield v. Whitfield*, 49 Ga., 471; *Graves v. Graves*, 88 Miss., 677, the latter two cases having reference to a peculiar kind of separation, but showing particularly that a spouse may be guilty of desertion without leaving the house in which the two had lived.

The original meaning of desertion was to loosen or unbind; and we do not believe that this idea has ever been entirely obscured. There is certainly a loosing of ties when a wife sets on foot a series of schemes intended to drive the husband away; and we see no reason why a husband who is thus driven away from his home cannot charge his wife with having willfully or maliciously deserted him. It is manifest in such case that the wife intends to accom-

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plish a severing of the marriage ties; it is a plain renunciation of marital obligations and duties, and necessarily imports a desertion.

It is clear to us that this old gentleman was set adrift as the result of coöperation between the wife and her children, and the only inference is that her desire was to be forever rid of him. It was therefore the case of continuous desertion, such as is required. The uncontradicted evidence makes out the case of a virtual assault of deadly character upon complainant, with likelihood of recurrence of such treatment. And this with the assent and approval of defendant. We are constrained because of her silence to accept the version of complainant as making out a strong case. We therefore direct a reversal of the lower Court and the granting of a decree of divorce here. Complainant and his sureties will pay the costs.

Holland v. Gaither.

JESSE HOLLAND v. A. T. GAITHER.

(Certiorari denied by Supreme Court, 1916.)

1. **EVIDENCE.** *Declarations made by owner of personal property at time of changing possession.*

Evidence of declarations of ownership and right to possession of personal property made by the reputed owner are not generally admissible if self-serving. Such evidence is, however, competent if the declarations accompanied and explained the act of transferring possession.

2. **SAME.** *Declarations of owners or possessors competent against remote vendees.*

Declarations in disparagement made by possessors or reputed owners of personal property and declarations of such parties made at the time of changes in possession or title are competent against subsequent purchasers or possessors of the chattel sued for.

3. **PRACTICE.** *Admission of incompetent evidence. Case tried by court.*

The general rule forbids the reversal of a case tried by the court without a jury solely upon the ground that incompetent evidence was admitted.

FROM SHELBY COUNTY.

Appeal in error from the Circuit Court of Shelby County. Part 4. M. W. LAUGHLIN, Judge.

D. W. DEHAVEN for Plaintiff in Error.

A. W. KETCHUM for Defendant in Error.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

Holland v. Gaither.

THIS is a replevin suit brought by defendant in error against Holland to recover the possession of a grandfather clock. Gaither sued as agent for what is known as the Arnold estate. There were subsequently added as parties plaintiff and executrix and the heirs of that estate.

The case was tried by the Circuit Judge without the intervention of a jury. He decided in favor of the plaintiffs below, and Holland has appealed and assigned five errors.

That the clock in question had at one time been owned by the Arnolds is beyond all question. The point in issue was whether this title and possession had been lost, and whether Holland had himself acquired the right to possession. Arnold rented the little shop in which the clock was stored to one Stokes. Stokes sold the shop to Jetton, and Jetton sold to Stanton for Stokes, and Stokes subsequently sold a half interest to Holland and finally sold the whole. When Holland left the shop he did not take the clock away. He however sent for it later.

The Circuit Judge admitted over objection evidence to the effect that one George Arnold, interested in the Arnold estate, had made the declaration that the clock belonged to the Arnold estate, and that it was left for or belonged to the Louisiana State Lottery of historic name and fame.

In respect to the admission of the declaration of Arnold that his father's estate was the owner of the property there was an infringement of the rule against the admitting of declarations in one's favor as to title. But it was competent to prove declarations made to Stokes, predecessor of Holland in title, to the effect that the clock was thus owned. For this was notice to Stokes of the title. Accompanying the delivery of possession, it was admissible under several well-established principles of evidence.

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In the third assignment it is objected that the Court admitted evidence of the statements of Stokes to Jetton and to others that the clock did in fact belong to the Arnold estate. Here again we have declarations accompanying the transfer of the property and also conveying notice of the state of the title to the vendee, and there is no question of the right to introduce such testimony. There was no error in this regard. The distinction between the two is no better illustrated than in the case of *Freda v. Tischbein*, 49 L. R. A. (N. S.), 701 and 708, relied upon by very learned counsel for appellant. It is therein pointed out that declarations accompanying possession or changes therein are admitted, and also that the rule forbidding declarations as to title was devised to prevent the introduction of evidence in the possessor's favor only. Authorities need not be cited to sustain the proposition that declarations by a privy in estate in disparagement of title are competent against even a remote vendee. Especially is this so when the declaration is made at the several times of transferring.

It is next said there is no evidence to support the verdict. Our disposition of the above assignments is sufficient answer to this one. Notwithstanding our holding that the declaration of George Brown was hardly admissible, there is ample competent evidence to sustain the verdict; and as the admission of this evidence before the Court without a jury was not prejudicial, no reversal should be had. For there can be no doubt that the great weight of the evidence admittedly competent was in favor of defendants in error. The general rule is not to reverse for erroneous admission of evidence case tried by the Court.

There was no error committed in allowing the addition of all the Arnolds as plaintiffs. At least Holland cannot complain. We are inclined to the view that Gaither

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himself in his representative capacity could have maintained the suit. But no prejudice to defendant below resulted from the addition of these other parties. Judgment affirmed.

W. B. CORNWALL V. DRAUGHON'S BUSINESS COLLEGE.

1. **CHANCERY PLEADING AND PRACTICE.** *Plea in abatement. Setting for argument upon sufficiency. When and when not proper.*

When complainant conceives that a plea upon its face and in connection with the record is insufficient in law to abate the suit, he should move that the plea be set down for argument whether the sufficiency of the *facts* averred be in law sufficient issue should be taken upon the *facts* to be determined upon proof and in the usual way.

2. **SAME.** *Construction of Section 6203 (Old Shannon) May be set down by clerk, but to be heard by chancellor.*

The Code section cited authorizes the setting down for argument the sufficiency of such plea, and this may be done before and by the Master. Nevertheless, the Master is not empowered to hear and determine the question arising. This must be done by the chancellor.

3. **ACTION IN DEBT.** *Prematurity. Promise to pay when able, or when convenient, or when other obligations are paid.*

A promise to pay an acknowledged debt when the debtor was able, or when convenient, or when other debts are paid, is a promise to pay within a reasonable time, to be determined from all the circumstances.

FROM DAVIDSON COUNTY.

Appealed from the Chancery Court of Davidson County.
Part 1. HON. M. T. BRYAN, Special Chancellor.

Cornwall v. Business College.

F. C. MAURY and W. B. MARR for Complainant.

CHERRY & STEGER for Defendant.

MR. JUSTICE MOORE delivered the opinion of the Court.

THIS bill was filed to recover a decree against the college company for \$300.47 which complainant charged as owing him by it for services rendered as teacher of stenography in the college. Defendant filed a plea in abatement to the action and alleged the prematurity of the suit. Complainant set the bill down for argument for insufficiency, but the Chancellor referred it to the Clerk and Master, who took proof and reported that the plea should be sustained and the bill dismissed. The report of the Master was confirmed by the Chancellor and complainant's bill dismissed. He has brought the case to this Court and assigns errors, each one of which practically goes to the correctness of the Chancellor's decree dismissing complainant's bill.

The defendant operated a business college in Nashville and in a number of other Southern cities at and before February, 1909, and complainant was on that date a teacher in its college in Nashville, Tennessee, teaching stenography. It became very heavily involved financially in the early part of 1909, and its debts then owing were pressing for payment. The college company set about devising ways and means to tide over and pay its indebtedness, and, on March 30th of that year, it made a proposition to the teachers and managers in its schools in which it sought to have them agree to a conditional reduction of fifteen per cent in their salaries beginning with the April salary of that year. The college proposed to its teachers and managers, if they would agree to such conditional reduction and remain in its employ until September, 1909, it would give them stock in the company at par value in double of the total reduction of each teacher and manager.

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A number of the teachers, among them complainant, agreed to this proposition and signed a paper to that effect, but later, that is on the 5th of April, 1909, the college company addressed them another communication in which it gave the managers and teachers an option to take stock in settlement of their reduced salary, or, if they preferred, "Instead of accepting the stock to leave fifteen per cent of their salary on deposit each month until times got better and the company can conveniently pay the amount." In this communication the company said, "All that is not paid by November 10, 1909, will begin to draw interest at eight per cent until paid. We make this proposition and explanation because several seemed not to understand the other proposition."

In response to this communication from the company to its managers, on the 5th of April, 1909, the teachers then employed in the business college at Nashville, being six in number, and among them complainant, signed the following agreement:

"We prefer instead of taking stock as previously explained in your circular letter to managers and teachers, beginning with April salary to leave fifteen per cent of our salary on deposit until times get better and it is convenient for you to pay the amount. However, it is agreed that all deferred payments on salaries that are not paid on November 10, 1909, will draw eight per cent interest until paid."

Complainant received all of his salary beginning with April, 1909, until April 22, 1912, except fifteen per cent of it, and this was left with the company, and was due and owing him on the latter date, at which time he was asked to resign as a teacher in the college, and did so. In his bill he charges that there is a balance due him of this fifteen per cent of salary that was kept on deposit by the company

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amounting to \$300.47, and payment of it being refused him after he was discharged by the company, he brought this suit.

The defendant filed the plea in abatement, as stated, and set up in bar of complainant's suit the two papers, one signed March 30, 1909, and the other April 7, 1909, in the latter one it being agreed that he was to leave fifteen per cent of his salary on deposit with defendant until times get better and it is convenient for it to pay the amount. In the plea it is averred that "times have not gotten better, and it is not convenient for respondent to pay complainant at the present time." The plea further avers the true amount due by defendant to complainant, it being set out in Exhibit 3 to the plea, and it appears from such exhibit that defendant had paid complainant over \$100.00, more than eighty-five per cent of his salary, and it is insisted, for the reasons stated in the plea, that the suit is premature, inasmuch as times are no better when the suit was brought than when the agreement was made, and that it was not then convenient for the college company to pay complainant the fifteen per cent of his salary remaining on deposit with it, according to the terms of said agreement.

This plea was filed October 10, 1914, the bill in this case having been filed September 13, 1913. After the plea in abatement was filed, complainant set it down for argument because of its insufficiency, and said: "If true, it presents no ground for abating the suit." Thereafter, on April 17, 1914, complainant moved to dispose of his exceptions to the plea filed because of its insufficiency to abate the suit, when "the Court being of opinion that said application should be acted on in the first instance by the Clerk and Master on the facts, doth so order and doth direct the same to be referred to the Clerk and Master to take proof and ascertain: first, whether or not the condi-

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tion in Exhibit No. 2 to the plea, to-wit: that the debt described in the bill remain on deposit until times get better and it is convenient for you to pay the amount, has been fulfilled; and, second, whether such a reasonable time has elapsed between April 1, 1909, the date of said Exhibit 2, and the date September 13, 1913, when the original bill in this cause was filed, as to entitle complainant to bring this suit."

The complainant excepted to this action of the Court.

The Master took some proof on this reference and reported that times had got better, but that it was not convenient for defendant to pay the amount it owed complainant; and in response to the second reference, the master reported that a reasonable time had not elapsed between the date of the agreement and the bringing of this suit so as to entitle complainant to sue for the balance of his salary.

Complainant excepted to this report, and his exceptions were overruled and the Master's report confirmed by the Chancellor. Thereupon complainant brings the case to this Court and insists that the Chancellor made manifest error in sustaining the report of the Master and dismissing his bill.

It is first insisted by him that the Chancellor was in error in referring the matters raised in complainant's plea to the Clerk and Master for a report of the facts thereon, and insists that when the plea was set down for argument because of its insufficiency, the Chancellor should have passed upon the averments of the plea and determined whether in law it stated sufficient grounds or reasons for abating the suit.

Under Section 6203, of Shannon's Code, it is provided that if the plaintiff conceives any plea or demurrer to be not good either for the matter or manner of it, he may set it down with the Clerk to be argued, and this is what the

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complainant did in this case. Believing that the grounds alleged in the plea were not sufficient in law to abate his suit, complainant desired the judgment of the Chancellor upon their sufficiency before taking issue thereon. It is not meant in this section of the Code, where it says "he may set it down with the Clerk to be argued," that the sufficiency of the plea is to be argued before the Clerk and he pass judgment thereon, but it is simply meant that the plea is set down for argument before the Clerk and is later argued before the Chancellor, and his judgment of its sufficiency is invoked in that way.

In *Klepper v. Powell*, 6 Heisk., 506, the Supreme Court very clearly indicates that the proper practice, where a complainant supposes the matter of a plea is not sufficient in law, is to set it down for argument for insufficiency, and while the Court does not so state in the opinion, we think it clearly inferable that it means that the decision of the sufficiency is to be rendered by the Chancellor and not by the Master. The same is in substance the holding of the Court in the case of *Hannum v. McInturff*, 6 Bax., 226.

Where the facts averred in the plea constitute a good defense in law to a further proceeding in the cause, if complainant conceives them to be untrue, he takes issue thereon, and that raises a question of fact for the determination of the Chancellor.

But the motion of complainant in this case, or setting the plea down for insufficiency, means insufficiency in law, and that the facts stated therein are not sufficient in law to abate the suit. We are clearly of the opinion that the Chancellor should have passed upon the sufficiency of this plea to bar the further prosecution of this suit, and not have referred the matter to the Master for report on the facts. The facts appeared in the plea and the exhibits thereto, and these facts were that plaintiff had agreed to let

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the money for which he was then suing remain on deposit with the college company until times got better and it was convenient for it to pay the amount. This agreement was made the 7th of April, 1909, and complainant brought his suit the 13th of September, 1913. With these facts appearing in the record as it then stood, and the grounds relied upon to abate the suit being fully set out in the plea and exhibits thereto, it became then a question of law whether such facts so stated in the plea and in the exhibits were sufficient to abate complainant's action, and the Chancellor should have passed upon this legal question, and not made any reference to the Master for a report upon any further facts. It is insisted under the assignment that the Chancellor was in error in not passing upon the sufficiency of the plea and in referring the matters to the Master, as he did, and we are of the opinion that this position is well taken.

We might content ourselves with disposing of the case at this point, but inasmuch as it is insisted that defendant has the report of the Clerk and Master concurred in by the Chancellor, and that the action of these two officers is binding upon this Court, we think we should dispose of other questions raised by the assignments, and this one among the number.

There is no dispute or controversy about the facts passed upon by the Master and the Chancellor, and in such case, if they have applied the correct legal principles and decided the case on those facts according to law, then their findings are binding upon this Court. But we do not think they have applied correct legal principles, and hence the concurrence of the Chancellor in the report of the Master based on error of law, as we think this was, is not binding upon this Court: *Hord v. Railroad Co.*, 122 Tenn., 400; *Turley v. Turley*, 85 Tenn., 251.

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It is next insisted under one of the assignments that the Master and Chancellor should have sustained complainant's exception to certain evidence of the witness Draughon, in which he undertakes to interpret and explain Exhibit 2 to the plea, and to add to and contradict its terms. In his testimony he said:

"We made the employes a proposition that we reduce their salaries fifteen per cent, with the understanding that when our other legitimate debts were paid, and the company was in shape financially, it would reimburse the employes for the reduction. The first agreement was something about their taking stock in lieu of the balance of their salaries, but that was changed to the agreement, that they wouldn't take the stock, but would just leave it until it was entirely convenient to pay the cash. We paid Professor Cornwall \$106.00 on this overcheck or reduction, then he demanded the back salary, as he called it,—what we considered a reduction,—and we refused to pay it. Still it is my intention for the company to pay him, when it pays all of its regular debts, as was agreed upon at the time this reduction was made."

This statement of the witness very materially adds to and conflicts with the written agreement signed by complainant and made an exhibit to the plea. In that agreement it was not stated that the fifteen per cent was to be paid when the other legitimate debts were paid, and the company was in shape financially to reimburse its employes for the reduction. Nor was it recited in that agreement that the fifteen per cent was left with the company until it was entirely convenient to pay the cash. Nor was it recited in such exhibit that the company was to pay all of its regular debts before their employes were to receive this fifteen per cent deposit. What was set out in that

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agreement, as we have stated several times and which complainant signed, was that, "beginning with April salary he was to leave fifteen per cent of his salary on deposit until times got better and it is convenient for the company to pay the amount." Nothing was said about waiting until the company paid all of its legitimate or regular debts, nor until it was entirely convenient for it to pay cash, and this testimony being clearly in contradiction of and in addition to the written agreement, and the witness's construction or interpretation thereof, was clearly incompetent and the Court should have sustained complainant's objection thereto and suppressed it.

It is next insisted by learned counsel for complainant that the parties to this contract have given it a practical construction or interpretation, and in doing so have construed it to mean that complainant was to wait for payment of this fifteen per cent deposit a reasonable length of time after the date of the agreement.

It has been often decided in this State, and the latest holding is found in *State ex rel v. University*, 129 Tenn., 279, that the practical interpretation of a contract by the parties thereto is entitled to great, if not controlling, weight with the Court. This rule of interpretation was announced by the Supreme Court of the United States in the case of *Chicago v. Sheldon*, 9 Wald., 154, and in *Life Insurance Co. v. Dutch*, 95 U. S. R., 269-73.

In this case it appears that some time before complainant quit the service of defendant at its suggestion and request, it had paid him, according to its own showing, \$106.90 of this fifteen per cent deposit of his salary. In other words, it had paid him a portion of the salary he left with it under the agreement, but just when it paid him this amount is not shown. It is manifest, however, that this

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payment was made between the date of the agreement made 5th of April, 1909, and the date of his discharge, April 22, 1912. Again it appears that defendant had paid one of its employes, Professor Figgins, in full the amount he had left on deposit with it, such payment having been made in stock of the company, which was equivalent to a cash payment, and it appears such payment was made previous to June 15, 1910. It had also paid before this suit was brought, to another one of the signers of this agreement, to-wit: Miss DeGraw, a portion of her deposit, and had paid J. W. Sanders before this suit was brought, all of the deposit he had left with it. These three were also signers to the paper, but when these different payments were made does not clearly appear, except that it is shown they were made before this suit was instituted. This is a clear interpretation of the meaning of the contract by these parties, and shows unmistakably that the college company construed the contract different from the way it now construes it, and that it was obligated to pay this money to the signers long before this suit was brought.

Again, it is insisted that the language of this contract that the signers thereto are to leave fifteen per cent of their salaries on deposit with the company for a reasonable length of time, shows that at the expiration of such length of time it then becomes due and payable.

Taking the paper of March 30, 1909, and also the proposition of the college company dated April 5, 1909, and the final agreement entered into April 7, 1909, we think we can determine from them that all of the parties understood that this money was to remain on deposit with the college company until November 10, 1909, when, if it was not then paid, it was to draw interest thereafter. Under the agreement signed March 30, 1909, it was agreed, "That all who remain in the employ of the company until Septem-

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her 1, 1909, under this agreement will receive stock in your company at par value to double the amount of his or her reduction." That agreement was signed, and had it remained in full force and the paper executed the 7th of April thereafter had not been signed and substituted for it, it is clear that the parties signing the first paper would have been entitled to stock in the company on the 1st of September, 1909, or in other words, to the payment of the amount they left with the company on that date. When the company made the proposition of April 5, 1909, it simply said to those who accepted this proposition that if you will leave fifteen per cent of your salary on deposit with the company, "until times get better and the company can conveniently pay the amount," then "all that is not paid by November 10, 1909, will begin to bear interest at eight per cent until paid." The meaning of this proposition is, if you will leave this money with the company, we will pay it to you by the 10th of November, 1909, and if we do not pay it to you at that time, then the amount on deposit with the company shall draw interest at eight per cent until paid. This was the proposition finally accepted by complainant and the others, and in the closing paragraph of the agreement of the 7th of April, it is recited that "all deferred payments on salaries that are not paid the 10th of November, 1909, shall draw eight per cent interest until paid," thus indicating that the proposition of the 5th of April was accepted with the understanding and agreement that if the amount left on deposit was not paid by the 10th of November, such amounts were to draw interest at eight per cent. Or in other words, the clear implied agreement in this closing sentence of the final agreement was, that all deferred payments on salaries were to be paid by November 10, and if not then paid, were to bear interest thereafter until they were paid.

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It seems to us, taking the three papers together and construing them together, that the clear implication in them is that such of the deferred payments as were left with the company were to be liquidated before the 10th of November, 1909, and if not so paid, were to draw interest thereafter. In other words, from April 7th until the 10th of November, was agreed to be a reasonable time in which the defendant should have to pay these deposits left with it, it being then supposed and believed that times would get better, and it would be then convenient for the company to pay the amounts then due these teachers. If such was not the implication and understanding of the parties, these recitations would hardly have been placed in these three documents.

But if mistaken in this construction of these papers, we think it clear that what was meant by leaving this deposit until times got better and it was convenient for the company to pay the amount, was nothing more or less than that such deposits were to be left with the company for a reasonable length of time, so as to enable it to tide over its financial troubles and get on its feet again, and it evidently was supposed that this would happen about the 10th of November thereafter, when these payments were to be made.

This is somewhat of a novel question, and just what is meant by this language is not altogether free from doubt. A question similar to this has never been before the Supreme Court of this State, but such questions have been passed upon by the Supreme Court of the United States and by the highest Courts in other jurisdictions.

In the case of *Neunez v. Dantel*, 96 U. S. R., 560, the following paper was construed:

"Joseph Dantel or order \$1,619.56, being balance of principal and interest for four years and six months serv-

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ices. This we will pay as soon as the crop can be sold or the money raised from other sources, payable with interest."

The Supreme Court held that this money was payable within a reasonable time after the date of the note, and that the question of what is a reasonable time was one to be determined by the Court. In that case, the defendants had five years in which to make payment of the amount due on the paper, and the Supreme Court said: "This was much more than a reasonable time for the fulfillment of the undertaking of the defendants, and the plaintiff was entitled to recover."

In *Lewis v. Tipton*, a case reported in 10 Ohio St., 88, it was held that a promise to pay, "when I can make it convenient with ten per cent interest," meant to pay within a reasonable time after the promise was made, and in passing upon the question of when this note was due, the Court said: "It would seem to follow that the note in and of itself would become due and payable in a reasonable time after its execution and delivery."

The question was before the Supreme Court of Alabama in *Culver v. Caldwell*, 137 Ala., 125, and the promise was to refund, "as fast as I can spare same from my salary," and the Court held that this "was meant only to give defendant reasonable time to acquire from his salary the money to be refunded," and it was further said in the opinion, "It must be held as a legal conclusion that a reasonable time for performing the stipulation in question had expired long before the bringing of this suit."

The question was before the Supreme Court of California in *Williston v. Perkins*, 51 Cal., 554, and it was there said that where it is agreed to pay for work done on a vessel when it is sold, the builder of the ship is only entitled to a reasonable time within which to finish and sell

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it, and if he failed to do so within such time, the agreement to pay becomes absolute.

Other cases to the same effect might be cited in support of the insistence that this paper gave to the college company at most only a reasonable time within which to pay this complainant the money he had left on deposit with it. It would seem, however, that the three papers themselves fixed the time of payment November 10, 1909; but if wrong in this view, then it is clear that the company would have only a reasonable time within which to make such payment. It could not compel this complainant to wait until it had paid \$175,000.00 of other debts, as seems to be insisted upon, nor until it had fully paid all of its debts, as is insisted upon by Mr. Draughon. These people were working for small salaries, and very kindly agreed to leave a part of their earnings on deposit with the company so as to enable it to tide over its financial troubles, but in doing this, they certainly never thought that they were to be compelled to wait until the entire indebtedness of the company had been discharged, but only for a reasonable time, and that reasonable time seems to be indicated in the papers themselves to be the 10th of November. Four years, five months and six days had elapsed from the date of the signing of this paper until this suit was brought, and it seems to us clear that complainant had waited a very reasonable length of time for the money due him, and especially in view of the fact that the company had compelled him to resign his position with it and to leave the State to secure other employment. Again, it seems that when his resignation was demanded, and he was forced to leave the service of the company, the balance of his salary was then due and payable, and that he had a right to demand it upon his discharge, and if the company failed to pay, as it did, then a right of action to recover it accrued at once.

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The decree of the Chancellor in this case is clearly erroneous, according to our view of this transaction, and it is reversed and a decree will be entered in this Court for the \$330.57 and interest thereon from the date of the filing of this bill, together with all the costs of the cause.

L. & N. RAILROAD ET. AL. V. J. D. HENSLEY.

(Affirmed by the Supreme Court, 1916.)

1. RAILWAYS. *Passenger. Express messenger loading express not.*

An employe of an express company is not, while engaged at a depot in loading or unloading goods, a passenger of the owning railway company.

2. SAME. *But he is not mere licensee.*

But such employe is an invitee and not a mere licensee, and the railway company is, in the absence of contract, bound to exercise toward him ordinary care to see that the premises which he is bound to use is in a reasonably safe condition, such as it exercises or should prudently exercise toward its own servants.

3. SAME. *But such railroad may by contract put risk of defective premises upon such employee.*

A railway company may by contract with an express company using its premises put the risk of injuries for defects upon the latter's employes.

4. SAME. *In such case the duty of care with respect to premises devolves upon express company.*

Where such a contract is made the duty of exercising reasonable care with respect to a safe place in which to work devolves upon or rather remains with the express company as master.

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5. MASTER AND SERVANT. *Assumption of risk for known or patently observable defects. Case.*

An express employe who is well aware of the peculiarities of an electric elevator and its defects and those of the shaft cannot hold either the owning railway company or his employer liable for injuries resulting from those defects.

6. SAME. *Contributory negligence. Sudden peril from probable occurrences.*

A servant cannot rely upon the exception of sudden peril as excusing his failure to exercise ordinary care where the occurrence which alarmed him was a repetition of that which he had theretofore observed and should have anticipated.

FROM KNOX COUNTY.

Appeal in error from the Circuit Court of Knox County.
VAN A. HUFFAKER, Judge.

JAMES B. WRIGHT, JOHNSON & Cox for Plaintiffs in Error.

W. T. KENNERLY for Defendant in Error.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

HENSLEY sued the three named plaintiffs in error for damages for personal injuries received while riding upon an elevator at the depot of the Louisville & Nashville Railroad Company in Knoxville. His declaration contains the following statement of facts: That he was injured in the manner above stated on the 3d day of July, 1914; that he was at that time and for a short time prior thereto had been in the service of the two express companies, charged with the duty of seeing that express packages were placed

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upon and taken from trains that arrived at the station in question, said packages being transported as express matter upon the cars of the railway company; that this freight was to be taken from the cars and transported over a freight elevator to the second floor, and from the second floor down to the cars when said express was to be sent out of Knoxville; that this elevator was jointly used by the railway and express companies for freight and express matter, but was maintained and cared for by the railway company principally as owner; that about 11 o'clock of the night of July 3d he had gone in pursuance of his duty as a servant of the express companies to the depot in question with some valuable packages which were to be placed upon express cars soon to leave Knoxville, and that he had gone to the lower floor or train shed for that purpose, and while returning from the lower floor to the second floor, upon which the express companies did business, he used the elevator in question as he was required to do and in accordance with the purpose for which it was provided and maintained, that while ascending in said elevator, the same slipped and fell a portion of the way down the shaft, and then suddenly reversed its motion and started upward, catching plaintiff's foot between the floor and sides of the car, thereby wounding, bruising and crushing his foot; and it was alleged that this was caused by the negligence of the defendants in failing to inspect and repair the dangerous condition of said elevator and in allowing it to become unsafe; because defendants had failed to warn plaintiff of the defects and dangerous condition of the elevator; that the elevator was unsafe owing to the worn out condition of the shoes or guides thereof; that the electric motor was defective, old and worn, and that the insulation, winding and packing of the motor and the elevator were such as to produce a short circuit and render the operation of the elevator un-

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certain; and that the defendants had negligently failed to equip the elevator shaft near the second floor with safety boards such as would prevent its catching the feet of passengers in the intervening space.

The case was tried upon pleas of not guilty interposed by all defendants. The Circuit Judge submitted the issues to the jury over objection. A verdict of \$800.00 in favor of plaintiff was returned. Defendants below made joint motion for new trial, but not succeeding in the lower Court, have brought the case to this tribunal, and have assigned one error, namely, that the Circuit Judge should not have submitted the case to the jury. We need not determine whether the form of the assignment is such as would make all appellants losers if it should be decided that any appellant was not liable.

We have given this case careful and prolonged consideration, after which we have felt ourselves constrained to the conclusion that the Circuit Judge committed error in allowing the jury to pass upon any of the questions raised. The first point of departure between appellants and appellee is as to the relation borne by the railway company to Hensley. It is urged by able counsel for him that he was a passenger and entitled to the high degree of care which the law has prescribed for the protection of passengers. The contention of the appealing railway company is that Hensley was a mere licensee, or at most an employee of a tenant, and that there was owing to him no other duty than that of refraining from wilful and wanton injury. It is also insisted that the express companies were mere tenants of the railway company, and that the former and their employes were bound to take the premises of the railway company just as they found them, whether safe or unsafe.

As is often the case, we find very able lawyers both in error. In the instant case we believe that neither position

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taken is the correct one, and that a solution of the vexed question cannot be arrived at by consulting authorities alone. In other words, it behooves us to look at the situation as it really was, and then determine whether the one or the other contention is sound, and if not, what rule should obtain.

That the railway company was not a carrier of passengers with respect to Hensley can be easily demonstrated. The rule whereby carriers are operated with the duty of exerting the highest degree of care had and has its foundation in the fact that the carrier assumes almost absolute control of the body and the movements of the passenger, and in the further fact that the passenger commits himself to the watchfulness of the carrier's servants. In the case at bar Hensley himself operated the elevator, according to custom as he says. Again, carriers of passengers are required to provide themselves with suitable equipment. This duty is to be expected upon such times and occasions only as passengers put themselves in charge of the carrier's servants. Further, a party who comes upon the premises or instrumentalities of a carrier at such times as he wills, without any notice to the carrier of his presence or of his intentions, cannot be in the nature of things in a situation to demand the highest care and attention.

Above all is the fact that the elevator used upon this occasion was not designed for passenger service, the company having an elevator for the use of passengers at another point. The elevator in question was installed solely for the purpose of transporting freight, express and baggage to and from the second floor, and was not designed for the transportation of passengers. The sole object was to facilitate the business of the carrier, and the servants thereof were themselves expected or required to use the elevator as a mere instrumentality or place of work. Hence

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the unsoundness of the position that anyone habitually on the premises who uses the elevator while performing duties can be treated as a passenger. With respect to the railway company's servants there can be no doubt that the relation was that of employer and employe; and after mature deliberation we have reached the conclusion that the railway company sustained no higher relation nor owed to Hensley any greater duty than that claimed by the employes of the road. We have no exact case upon the question, but those authorities to be found in 9 Ruling Case Law, page 1252, and *Walsh v. Cullen*, 18 L. R. A. (N. S.), and note, are nearly in point, or at least afford some aid in arriving at a solution. It is certainly true that the railway company was with respect to its employes using the elevator in no other way than an employer operated with the duty of ordinary care to see that the elevator was reasonably safe for use for freight purposes. It would be a strange application of doctrine to hold that this company owed a greater duty to the servants of express companies who used the machine in the same manner as its own employes and for like purposes.

But the position taken by able counsel for the railway company that it was a mere lessor, and that the express companies and their servants had to take the premises as they found them, is with respect to this case equally unsound. The doctrine contended for is well established in the law of landlord and tenant, but it cannot apply to premises which remain virtually in the control of the landlord or which may be jointly used. For the foundation of the rule of exemption of the landlord is that the tenant assumes toward the public and his own servants the obligation of exercising due care. When the landlord retains total or partial control, non-application of the rule is manifest.

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We have reached the conclusion that the servants of the express companies were in a manner invitees; that they had for long years used the elevator for the purposes and in the manner adopted by Hensley on the night of his injury, and that this custom had ripened into an implied direction to use the elevator in that way. It cannot be disputed that Hensley had business upon the depot grounds in which both his employers and the railway were vitally concerned; and this fact carried with it an implied invitation on the part of the railway company to come on the grounds and use the instrumentalities provided or reasonably suitable for the performance of the joint object. 29 Cyc., 456.

It can be readily seen that the degree of care owing Hensley was such as was suggested by ordinary prudence. In other words, the obligation on the part of the railway company was to exercise reasonable care to see that the elevator thus used by the employes of the express companies was reasonably safe and reasonably adapted to the required or desired purposes. It could not in the nature of things be an insurer; nor could it be expected that it would exercise extraordinary care as master.

After a careful analysis of the testimony we have reached the conclusion in the first place that the elevator upon which Hensley was hurt was not in a defective condition such as rendered it an unfit instrumentality; or that if it was, the railway company was not blamable for the reason that there is no disclosure of any negligence upon its part with respect to the equipping, inspecting or operating of the elevator. Further, we are of opinion that the evidence of the railway company that it exercised reasonable care in the inspection of its equipment is uncontradicted, and therefore to be accepted as established. In addition to all this, we do not believe that there is any

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other conclusion to be drawn from the testimony than that Hensley was fully cognizant of every visible or knowable defect about the elevator, and assumed the risk thereof. Nor is his contributory negligence, although not urged by appellants, entirely free from doubt.

No inference of negligence can be drawn from the mere happening of this accident, whatever may be said at this stage of the law in Tennessee with respect to the doctrine of *res ipsa loquitur*. Or even if the doctrine has application, the presumption is overturned by positive evidence that rigid inspection had been made. It was demonstrated that the elevator was in splendid condition immediately before and immediately after the accident. This is conclusive that it was in reasonably good condition at the time of the accident, or at least that the accident happened from unforeseeable causes, or because of something not remediable by the exercise of ordinary care. Again, it was shown in this case, and it is known of all men, that electrically operated elevators sometimes get out of repair or order, notwithstanding the utmost vigilance. This is an additional reason why no presumption of negligence should attach to the happening of the accident to Hensley. As a matter of fact there was so much doubt as to the real cause of Hensley's injury as to justify a motion for a directed verdict. The real cause could be arrived at by speculation only.

Hensley says that he was familiar with the elevator, having used it constantly for several years. He admits that he had seen it stop and go up and down. His testimony is that the elevator just before reaching the second floor steadied itself and started down, and that in his excitement he grabbed the cable, and that the elevator reversed itself and began to ascend. This may or may not have been an ordinary incident of its operation. But how-

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ever that may be, he confesses that he had seen it behave that way before. Evidently the elevator was in its ordinary condition, or else it would not have changed its course when he took hold of the cable. He admits that the pulling of the cable down starts the elevator going up, and yet he grabbed the cable and reversed its course. He urged that he was excited, but he should not have lost his head amid familiar surroundings and in situations which he had observed. There is the absence of happenings inducing alarm from sudden peril; and it is for this reason that his contributory negligence is a factor which should blend with his assumption of risk.

He urged in his second count that the flooring of the elevator was wet and greasy, and that this was one of the causes of his falling to the floor and getting his foot caught. He confessed that he well knew the condition of the floor, and further that it was not in any worse condition than usual, and that ordinarily the floor was in that shape. He admitted that a great deal of ice cream and ice were carried on the elevator by his companies upon the night in question, and that this was in the main the cause of the slippery condition of the floor of the elevator. Having knowledge of this, or this condition being the result of operations by other servants, there can be no recovery therefor, nor can it figure in the chain of causation. *Knitting Mills v. Hickman*, 133 Tenn., 43.

It is urged that the absence of safety boards was a cause of his injuries, and that it was negligence in all the defendants to operate the elevator without these means of protection. We are of opinion in the first place that had the boards been in the well they would not have protected Hensley, or that this was so doubtful as not to amount to a probability. Again, there is not but one view to be taken of this matter from the standpoint of assumption of risk.

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Hensley did not deny thorough knowledge of the elevator shaft, and particularly of the absence of these guards. Having used the elevator for years without them, he must be held to have taken upon himself this risk. But however that may be, there is no suggestion that a large freight elevator shaft should be equipped with these, or at least there is no foundation for the charge that a master who designs an elevator for freight service by employes who are expected to look out for themselves is guilty of negligence in failing to have these protecting boards.

There is no suggestion that any employe of the railway company was ever hurt at this elevator or even considered himself in peril, nor is there anything upon which there could be asserted the duty upon the part of the railway company of taking any other precautions for the safety of its employes than those which it had observed or put into execution. We repeat that if the railway company was not negligent in supplying this instrumentality and place of its work for its employes it could not be held liable for injuries to employes of express companies who are in no better position than its own. The conclusion at which we have arrived is that the Circuit Judge should have sustained the motion of the railway company for a directed verdict.

If the railway company could not be held guilty of negligence, we do not believe that there is any foundation for the imputation of negligence upon the part of the express companies. Undoubtedly the elevator was with respect to the express companies a mere instrumentality or place of work for their servants. There is no hint of anything that these companies could have done toward making the place or instrument any safer. Either it had a right to rely upon the railway company to discharge this duty or to require its servants to look to the company for satisfaction or

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themselves to assume the risk. At all events we do not believe that the express companies were negligent in directing or permitting their servants to use the elevator in the discharge of their duties and in assuming that the railway company would exercise due care in looking after this instrumentality. Hensley understood when he entered the service that the railway company was to lend or furnish the railway facilities, and that the latter would naturally exercise greater care with respect thereto than could be expected of the express companies. Hence the irresistible conclusion that if the railway company was not guilty of any breach of its duty toward Hensley, his employers could not be convicted.

It results from the foregoing that the Circuit Judge was also in error with respect to the express companies, and that he also should have sustained their motion. The judgment is reversed and the suit against all defendants dismissed.

It will be observed that we did not treat the alleged written contract between Hensley and his company and the latter with the railway company as factors of controlling importance. While this is not a one-sided proposition, we concluded to take the view of Hensley that he was under a new contract, one that had not been reduced to writing. At the same time this did not take away from the railway company the right to insist that Hensley assumed all the risks of the railway premises, and that because of this there was a lesser degree of vigilance owing him upon the part of the express company. We seem to have adopted in this State the rule of treating express messengers as mere employes of their companies, and that they may contract away their right of action against railways for damages for defective instrumentalities. *McKay v. Railroad*, 133 Tenn., 590.

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EMMA NIMMERFALL ET AL V. M. E. LINK, EXECUTOR.

Writ of certiorari denied by Supreme Court, 1918.

1. INSTRUCTIONS TO JURIES. *Absence of criticism.*

When the charge of the court is not assailed or specifically criticized, the reviewing tribunal will presume that instructions were correct and covered every theory arising upon the evidence.

2. WILLS. *Insane Delusion. Will the product of a well-grounded belief.*

A will excluding a son is not the product of an insane delusion where the testatrix had, from the conduct of the son, a well-formed belief that he had lost his affection for her and was hostile to her.

3. SAME.

A will, although the product of prejudice or hatred, is nevertheless valid if the testatrix had reason in the nature of things to dislike the disinherited person.

4. RESIDENCE. *Report of County Health Board.*

Reports made and filed with the County Board of Health pursuant to statutes and pertinent regulations, may be introduced in evidence.

FROM DAVIDSON COUNTY.

Appeal in error from the Third Circuit Court of Davidson County. A. G. RUTHERFORD, Judge.

JAMES G. FRAZIER, J. G. LACKEY and EUGENE McSWEENEY for Plaintiffs in Error.

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W. C. CHERRY and T. T. McCARLEY for Defendant in Error.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

THIS is a will contest in which certain children and heirs at law of a Mrs. Mary Kiber assails as invalid a document executed in November, 1915, purporting to be the last will and testament of Mrs. Kiber. The issues were made up and submitted to a jury in the Circuit Court and the verdict of the jury was in favor of the validity of the will. The contestants, after losing their motion for a new trial, appealed the case to this Court and have assigned errors now to be considered.

The first assignment is that there is no evidence to sustain the verdict. This is subdivided into three heads, and this separation of the issue into its several parts simplifies and renders more intelligible our disposition of the questions presented. We have read with much care, interest and profit the able brief presented by counsel for the contestants, and our responses to the points could be extensive, but that would be beside the mark and almost profitless. As a matter of fact, the questions arising can be handled with brevity. But a brief treatment is no indication that we have not given the case most painstaking consideration.

The first objection is that there is no material evidence tending to show the due execution of the will, particularly with reference to knowledge of contents, as is required by the rules in this State. It is urged that Mrs. Kiber was old, infirm and illiterate; that the executor was the draftsman and interested in the will, and these circumstances augmented the burden upon the proponents to show that

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Mrs. Kiber at the time she executed the document knew of and assented to its provisions. Granting that the rule of law as the major premise of the above is correct, and that the conditions called for its application, the conclusion urged does not follow, for the reason that we are bound to presume that the Circuit Judge laid down for the guidance of the jury every needful proposition. We say this because there is no assignment predicated on the charge of the Court. We discover no special requests in record, and while the charges as copied is not specific upon the point, we are at the same time constrained to presume because of the astuteness and industry of counsel that this burden was called to the attention of the Court and the jury during argument. So that the only question for us to pass upon is as to whether or not there is material evidence tending to show that Mrs. Kiber was fully cognizant of the provisions of her will and approved the same or uttered them as her last desire with respect to her property. We find testimony to the effect that she gave to the draftsman a rough outline of her wishes and that he took the notes and put them in legal form and shape of a will; that this document was delivered to Mrs. Kiber before it was witnessed, that she had read over the same and was fully aware of all provisions. This suffices to warrant the finding of fact that notwithstanding any grounds of suspicion pointed out in our cases, Mrs. Kiber accepted the instrument as embodying her last wishes.

It is urged that there is no evidence to support the verdict that Mrs. Kiber possessed testamentary capacity. It suffices to say that there is much evidence to the effect that she was of sound mind and knew what she was about. It was for the jury to determine whether this evidence was weak or strong. The presumption at the outset was

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that Mrs. Kiber was of sound mind. The burden of overturning this was upon the contestants; and it would be a difficult matter to assert that a verdict in favor of the will can be assailed as having no evidence in support when this presumption and the testimony of a physician and some neighbors all tend to show that the old lady knew what she was about regardless of age or bodily condition.

It is next contended that the evidence unmistakably showed undue influence and that the verdict to the contrary by the jury is without supporting testimony. The theory of the contestants was that this will was procured by Mrs. Averill, the chief beneficiary, through persistent efforts to prejudice her mother against her son George; and while there are some circumstances tending to show that Mrs. Averill did not highly esteem her brother and that she was not in the habit of speaking very favorably of him to her mother; yet Mrs. Averill denies all efforts to poison the mind of her mother with respect to this brother, and insists that she never at any time suggested the making of a will or disposing of the property of her mother in such a way as to favor her above the others. It is also urged that Dr. Link exerted his influence upon the testatrix for the purpose of prejudicing George, and with the further object of having himself named as executor and thus enriching himself. It suffices to say that there is not any substantial evidence warranting this contention, or that if there be such testimony the jury did not give it credence.

Looking at the circumstances as they really are, assuming, as we are bound to, that the jury credited the evidence of the proponents and did not attach any or much weight to that of the contestants, the will in question is not a wholly unreasonable one. It was proven that Mrs. Averill

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was, throughout her life, devoted to her mother; that she remained with her mother more than any of the other children, and did more for her, and was entitled decidedly to a greater show of gratitude upon the part of the mother than was any other child. It was also developed that George was not kind to his mother, nor considerate of her; that he had at times mistreated her, and that he had undoubtedly given her cause to believe that he did not bear toward her that filial affection which a mother would have the right to expect of a son, especially an only son. These recitals are sufficient to answer the contention that there is no evidence to support the verdict negating undue influence.

It was lastly contended that the evidence demonstrates that the will disinheriting George and giving the bulk of the estate to Mrs. Averill was the offspring of an insane delusion upon the part of the mother that George had threatened to kill her, and was totally devoid of filial affection, duty or regard. This was the chief issue developed in the case as disclosed by the record, and it was unmistakably urged before the Court and the jury as the one vitiating circumstance. We are not prepared to say that this contention is baseless. It was shown that up to some months before the making of this will in question Mrs. Kiber had made declarations that she intended to give George a substantial share of her property, and that in fact she had executed a will in which he was a favored beneficiary. Nevertheless, it is disclosed that, for reasons which are not fully set out but are hinted at, George remained for several months preceding the execution of the will in a manner alienated from his mother. It is proven that he was not on speaking terms with her, seldom visited her, and that when she died he expressed no regrets. We

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do not discover that there was any actual violence offered by George to his mother within the few months preceding the execution of the will, but it was shown that some sixteen years prior thereto he had made an attack of some kind and had generated the belief in his mother that he intended to do her harm. We are inclined to the view that George was and is of a turbulent disposition and ungovernable temper; and when all these facts are taken into consideration we are unable to say that Mrs. Kiber was living under the *delusion* that George intended to do her violence.

The authorities brought by learned counsel are clearly to the effect that the will of a sane person which is the outcome of an unfounded belief and insane delusion with respect to one who would naturally have a claim upon his or his bounty is invalid. The crucial question is as to whether or not the belief which guided the testatrix was so unfounded and so lacking in verity as to be the result of a diseased mind or the product of efforts at undue influence. The latter feature is out of the case for the reason hereinabove stated. With respect to the delusion, we feel constrained after a careful analysis of the circumstances to the conclusion that the jury had some evidence on which to base their conclusion that the belief of Mrs. Kiber if entertained with respect to George's animosity towards her, was not so baseless as to be characterized as a delusion. If not a delusion in this sense, or if it had substance such as generated the motives governing the old lady at the time she made her will, and if concomitantly with this state of mind it be shown that the testatrix possessed testamentary capacity otherwise, we as a reviewing Court cannot disturb a verdict upholding such a will. Courts are unable to delve into the minds and consciences

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of old people, to assay their motives as it were, and then pronounce the motives foolish and baseless. For the law recognizes the possession of property by old people with the power of disposition by will as the most effectual means of securing the attendance and comforts too often denied to the aged. If an old person entertains a belief gathered from long years of mistreatment that a child wishes her death and would not be averse to it, and if this belief gets to the point of a propensity to personal violence, no Court can say that this is an insane delusion and that a will made adversely to the one who generated this feeling and in favor of another who was consistently kind was the product of an unsound mind.

We overrule this first assignment of error. We need not treat of the contention that there is no evidence to show the death of the testatrix, for the reason that we did not find it specified in any of the assignments of error.

In assignment No. 2 the action of the Court in allowing witness Dr. Link to exhibit certain reports made to the County Board of Health with reference to the subject of pellagra is assailed. The assignment of error is not specific enough. But, however that may be, we have reached the conclusion that even if treating the documents as inadmissible, no substantial harm was done such as would justify a reversal. In addition to that we see no reason why these documents could not be exhibited to the jury with or without the proof of their authorship or verity. It was shown that they were public documents and accessible to anyone who desired to read them. The practice of admitting such evidence is almost universal. We overrule this second assignment of error.

There appear under assignment No. 2 certain objections to the admission of photographs with respect to the

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bodily condition of Mrs. Kiber during the time it was said that she had pellagra. We see no reversible error in this. There was no reason why these photographs could not be exhibited either as confirming Dr. Link in his theory that she did not have pellagra and in contradiction of the physicians who said she did have it.

In assignment No. 3 the action of the Court in permitting Mrs. Averill to remain in the room during the taking of certain testimony is criticized. Learned counsel failed to point out in his brief the page of the record where the action was recorded. This would relieve us of the duty of disposing of the question at all. But treating the question as properly raised, the matter of permitting a party vitally interested in a case to remain in a Court room during the examination of certain witnesses is at certain stages in the discretion of the lower Court. But, however that may be, it appears that Mrs. Averill was introduced in rebuttal. Will contests are peculiar cases, in that the executors or the plaintiffs proceed to make out their cases by proving the due execution of the will. The contestants then introduce their attacking evidence and the proponents are then allowed to rebut the case thus developed. The rule is universal that the practice of excluding witnesses does not apply to the introduction of rebuttal evidence. For all the reasons above given we overrule this assignment of error, stating, however, that the practice pursued with respect to the introduction of witnesses in the lower Court is not to be encouraged, and that there might be cases where a reversal would have to be ordered. We do not believe, though, in the present case that a reversal should be had because Mrs. Averill remained in Court. We hardly think that the case of *Eaton v. Dennis*, 103 Tenn., 155, is applicable for the reason that Mrs. Averill was not a proponent.

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We see no substantial reason why the verdict in this case can be legally disturbed. It results that all assignments of error must stand overruled and the judgment of the lower Court establishing the will affirmed. Appellants will be taxed with the costs of the lower court.

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